DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 08-1457
Title: New Process Steel, L.P., Petitioner
v.
National Labor Relations Board
Docketed: May 27, 2009
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (08-3517, 08-3518, 08-3709, 08-3859)
Decision Date: May 1, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
May 22 2009	Petition for a writ of certiorari filed. (Response due June 26, 2009)
Jun 17 2009	Order extending time to file response to petition to and including July 27, 2009.
Jun 26 2009	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Jul 14 2009	Order further extending time to file response to petition to and including August 26, 2009.
Aug 18 2009	Order further extending time to file response to petition to and including September 29, 2009.
Sep 29 2009	Brief of respondent National Labor Relations Board in opposition filed.
Oct 14 2009	DISTRIBUTED for Conference of October 30, 2009.
Nov 2 2009	Petition GRANTED.
Dec 3 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 24, 2009.
Dec 3 2009	The time within which to file respondent's brief on the merits is extended to and including February 2, 2010.
Dec 23 2009	Motion to dispense with printing the joint appendix filed by petitioner New Process Steel, L.P.
Dec 23 2009	Brief of petitioner New Process Steel, L.P. filed.
Dec 30 2009	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Dec 30 2009	Brief amicus curiae of Michigan Regional Council of Carpenters filed.
Jan 4 2010	SET FOR ARGUMENT ON Tuesday March 23, 2010.
Jan 11 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 11 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.

Jan 22 2010	CIRCULATED.
Feb 2 2010	Brief of respondent National Labor Relations Board filed. (Distributed)
Feb 8 2010	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Mar 4 2010	Reply of petitioner New Process Steel, L.P. filed. (Distributed)
Mar 23 2010	Argued. For petitioner: Sheldon E. Richie, Austin, Tex. For respondent: Neal K. Katyal, Deputy Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. _____ 081457 MAY 22 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

SHELDON E. RICHIE
Counsel of Record
RICHIE & GUERINGER, P.C.
100 Congress Avenue,
Suite 1750
Austin, TX 78701
Tel: (512) 236-9220

BARRY RICHARD
GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32301

JOSEPH W. AMBASH
JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
Tel: (617) 310-6091

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the National Labor Relations Board have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board"?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 14.1(b), the caption contains the list of all parties appearing here and before the United States Court of Appeals for the Seventh Circuit. Pursuant to Rule 29.6, petitioner states that New Process Steel, L.P. is a Delaware limited partnership. The partners are New Process Steel GP LLC, an Illinois limited liability company, and Richard Fant, an individual. New Process Steel Holding Co., Inc., a Texas corporation, is a member of New Process Steel GP LLC.

No publicly traded company owns 10% or more of the stock of New Process Steel, L.P.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	4
I. The Circuits Are Divided Over the Question Presented	6
A. Background	6
B. The Conflict	9
II. The Decision Below Misconstrues Section 3(b) of the NLRA	11
CONCLUSION	13
APPENDIX A, Opinion of the United States Court of Appeals for the Seventh Circuit in *New Process Steel, L.P. v. NLRB*, Nos. 08-3517, 08-3518, 08-3709, 08-3859	App. 1
APPENDIX B, Decision of the National Labor Relations Board in *New Process Steel, L.P.*, 351 NLRB No. 13	App. 26

TABLE OF CONTENTS – Continued

Page

APPENDIX C, Decision of the National Labor Relations Board in *New Process Steel, L.P.*, 351 NLRB No. 25 ..... App. 72

APPENDIX D, Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, No. 08-1162 ..... App. 82

TABLE OF AUTHORITIES

Page

CASES

Laurel Baye Healthcare of Lake Lanier v. NLRB, No. 08-1162 (D.C. Cir. 2009) 3, 6, 9, 10, 12

Negonsott v. Samuels, 507 U.S. 99 (1993) 12

New Process Steel, L.P. v. NLRB, Nos. 08-3517, 08-3518, 08-3709, 08-3859 (7th Cir. 2009).....1, 6, 9

Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009).....3, 6, 10

NLRB DECISIONS

Bon Harbor Nursing & Rehabilitation Center, 345 NLRB 905 (2005).....5

Statutes

29 U.S.C. §§ 151 *et seq.*.....*passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioner New Process Steel, L.P. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *New Process Steel, L.P. v. NLRB*, Nos. 08-3517, 08-3518, 08-3709, 08-3859.[1]

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1) is published at 2009 WL 1162556 (7th Cir. 2009). As of the date of this petition, the opinion has not been published in the federal reporter.

JURISDICTION

The Court of Appeals filed its opinion on May 1, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] Case Nos. 08-3517 and 08-3518 are petitioner's petitions for review of two NLRB decisions (App. 26; 72) which arose from the same facts. Case Nos. 08-3709 and 08-3859 are the NLRB's petitions for enforcement of its orders in the same underlying Board decisions.

STATUTE INVOLVED

This case involves provisions of the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 151 *et seq*. The pertinent provisions are reproduced below:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. 29 U.S.C. § 153(b).

STATEMENT OF THE CASE

The National Labor Relations Board is the appellate body charged with enforcing the National Labor Relations Act. It creates and enforces U.S. labor policy. Its decisions maintain industrial peace, shape the future of labor law, and carry out an important congressional mandate. And, absent guidance from this court, no one can be sure whether or not it has existed for the past 16 months.

On May 1, 2009, the validity of hundreds of decisions of the National Labor Relations Board (the "Board" or the "NLRB") was cast into doubt by diametrically opposed holdings from two courts of

appeals. As of the date of this petition, the authority of the NLRB from December 31, 2007 through the present is unclear. According to the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, No. 08-1162 (D.C. Cir. May 1, 2009) (App. 82), the Board has been without power to act since December 31, 2007; according to the Seventh Circuit's decision in this case (App. 1), and the First Circuit's decision in *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. March 13, 2009) *reh'g denied*[2] the Board acted lawfully when it rendered decisions with only two members.

The United States Court of Appeals for the Seventh Circuit had jurisdiction over the underlying decisions of the National Labor Relations Board pursuant to Sections 10(e) and (f) of the National Labor Relations Act. 29 U.S.C. § 160(e) and (f). This matter arises from the near-simultaneous issuance of contrary holdings from the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the District of Columbia on May 1, 2009. The question before each court of appeals was the same as the question presented by this petition – does the National Labor Relations Board have authority to act and issue decisions with only two sitting members, where the NLRA provides that "The Board is authorized to delegate to any group of three

---

[2] On May 20, 2009 the First Circuit denied Northeastern Land Services' petition for rehearing *en banc*.

or more any or all of the powers which it may itself exercise . . . " and "three or more" members constitute a quorum of the Board "at all times." 29 U.S.C. § 153(b).

ARGUMENT

The Courts of Appeals – particularly the First, Seventh and District of Columbia Circuits – are divided over the NLRB's authority to act with only two sitting members. The District of Columbia Circuit interprets the NLRA to require "three or more" sitting Board members "at all times" in order for the agency to act. App. 88-90. By contrast, the First and Seventh Circuits interpret the NLRA to allow the Board to act with only two members, so long as the Board delegated its authority to a group of "three or more" at some point in the past, even where the Board acknowledged that one of the three member's term would expire in mere days. Essentially, the First and Seventh Circuits endorse the NLRB's attempt to end-run the NLRA's quorum provision.

Absent resolution from this Court, employees, employers and unions throughout the country will face continued uncertainty.[3] New Process Steel, L.P.

[3] Petitioner has not sought *en banc* review of the decision below. Petitioner believes the question presented by this petition is of significant import to labor relations, is capable of repetition yet evading review and should be resolved directly once and for all by this Court. Indeed, in 2005, the NLRB issued a decision with only two members, but the Board's authority to do so was

(Continued on following page)

("New Process") asks this Court to grant its petition and provide much-needed resolution of the current circuit split, which threatens to stymie labor relations throughout the United States. This petition is especially timely, given that the role of labor organizations in the American economy regularly dominates the front pages. While economists, union officials, scholars, employees and employers debate the role organized labor will play in the new economy, a cloud looms over the very agency charged with administering the NLRA and ensuring industrial peace. As of the date of this petition, there is no clear answer to a question of critical importance to labor law – does the NLRB exist?

As a result of the circuit split, the validity of hundreds of decisions of the NLRB has been cast into doubt. Absent resolution by this Court, the legal effect of virtually every NLRB decision issued from December 31, 2007 to the present and into the future, unless and until a third member is nominated by the President and confirmed by the Senate, is uncertain. This Court should resolve this disagreement now. The

---

ne er decided as that particular case was not challenged by the employer in the courts of appeals. *See Bon Harbor Nursing & Rehabilitation Center*, 345 NLRB 905 (2005) (published order granting motion to strike by Chairman Battista and Member Liebman). The need for final resolution by this Court was recently made abundantly clear by the NLRB when it issued a statement declaring that it would "continue to issue decisions and orders in unfair labor practice and representation cases" with only two sitting members. *See Statement of Chairman Wilma B. Liebman and Member Peter C. Schaumber Concerning the District of Columbia Circuit's Laurel Baye Healthcare Decision, dated May 18, 2009.*

issue is of national import because the appellate body of the NLRB has effectively ceased to exist in the D.C. Circuit, while the First and Seventh Circuits have endorsed the two-member Board's actions. Because the D.C. Circuit has jurisdiction over every NLRB decision, the circuit split is even more problematic. Today, the validity of a Board decision against an employer within the First or Seventh Circuit turns on who wins the race to the courthouse. If the employer exercises its right to seek review from the D.C. Circuit, *Laurel Baye* controls and the Board's decision will be vacated. If, however, the Board petitions the First or Seventh Circuit for enforcement of its order, *Northeastern Land Services* and *New Process Steel* control and enforcement will likely be granted, assuming that the Board prevails on the merits.

This case directly raises the issue of the viability of a two-member Board. The Seventh Circuit's holding is incorrect; as the D.C. Circuit rightly held, the plain language of the NLRA *requires* "three or more" sitting Board members "at all times" in order for the agency to function.

I. The Circuits Are Divided Over the Question Presented

A. Background

The NLRA, passed in 1935 and amended in 1947, created the NLRB, a federal agency that administers the NLRA and functions as the appellate body in labor disputes regarding union representation issues

and unfair labor practices. Representation cases are decided by the NLRB's 34 regional offices located throughout the United States, while unfair labor practice cases are tried before NLRB administrative law judges. Both representation and unfair labor practice decisions can be appealed to the five-member Board in Washington, D.C. The Board is comprised of a chairman and four members. Traditionally, the chairman is a member of the president's political party and the remaining members consist of two Democrats and two Republicans.

On December 28, 2007, the Board had only four members, and the terms of Members Dennis Walsh and Peter Kirsanow were set to expire on December 31, 2007, leaving the Board with only two members – Democrat Wilma Liebman and Republican Peter Schaumber. Under Section 3(b) of the NLRA, the Board would have lacked a quorum and been unable to function. In an attempt to continue deciding cases while lacking the required three-member quorum, the four members delegated the Board's authority to Members Kirsanow, Liebman and Schaumber and declared that Members Liebman and Schaumber would thereafter constitute a quorum of the newly-created three-member body.

The Board relied on three provisions of Section 3(b) in support of its actions: the *delegation* provision, the *quorum* provision and the *vacancy* provision. The delegation provision states that the Board can delegate its authority to a group of three or more members; the vacancy provision states that a vacancy on the Board

will not impair the remaining members' ability to exercise the Board's powers; and the quorum provision states that three members of the Board constitute a quorum of the Board, except that two members will constitute a quorum in the event the Board properly delegates its authority to a group of three or more members under the delegation provision. Thus, according to the Board, its delegation of authority at a time when there were "three or more" sitting Board members would allow the Board to function with two members in perpetuity even though the Board knew at the time of the delegation that two members' terms would expire in days.

In every decision issued since the attempted delegation, including the decisions that are the subject of the Seventh Circuit's holding below, the Board has included the following footnote by way of explanation:

> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. *See* Sec. 3(b) of the Act.

B. The Conflict

The Seventh Circuit's decision in this case has created a conflict over whether the NLRB, contrary to the plain and unambiguous language of the statute, can function with only two sitting members.

In *Laurel Baye Healthcare of Lake Lanier v. NLRB*, No. 08-1162 (D.C. Cir. May 1, 2009), the Court of Appeals for the D.C. Circuit vacated a decision of the two-member Board and remanded it "for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum." App. 98. The court ruled that the NLRA's quorum provision, which states that "three members of the Board shall, at all times, constitute a quorum of the Board," requires a minimum of three sitting Board members for the agency to function. App. 88-90. The court held that any such delegation "cannot survive the loss of a quorum on the Board itself." App. 88. Because it was not properly constituted at the time the court rendered its decision in *Laurel Baye*, the Board "did not have the authority to issue the order" before the court. App. 98. In reaching its conclusion, the court looked to the plain language of the Act and found that "Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met *at all times*." (Emphasis added). App. 90.

In the case below, issued the same day as *Laurel Baye*, the court's holding is squarely at odds with the D.C. Circuit's decision in *Laurel Baye*. In *New Process*

Steel, the court looked to the language of the Act and inexplicably concluded that the vacancy provision authorized the Board to continue to function with only two members. This interpretation of the NLRA effectively deletes the first sentence of Section 3(b) from the statute. According to the court, the NLRA "expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members." App. 10. The Seventh Circuit's decision relied on an earlier case, *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), in which the First Circuit upheld a decision of the two-member Board under the same rationale.

In a decision issued at almost the exact hour as *Laurel Baye*, the Seventh Circuit rejected the argument that the NLRA "restricts the Board from acting when its membership falls below three." App. 10. In other words, the Seventh Circuit rejected the very rationale on which the D.C. Circuit relied in *Laurel Baye* in invalidating the two-member decisions.

The direct conflict between the Seventh Circuit in this case and the D.C. Circuit in *Laurel Baye* creates an untenable situation: decisions of the NLRB are void if challenged by employers in the D.C. Circuit, but binding in the First and Seventh Circuits if the NLRB seeks enforcement of an order. The practical effect of the circuit split is that the legal effect of virtually every NLRB decision issued since December 31, 2007 will now be decided by who wins the race to the courthouse. It is in the interest of all

employers, employees, labor organizations, and the Board itself that this Court promptly resolve the split over the question presented. Unless and until this Court does so, enforcement of the NLRA will remain at a standstill.

II. The Decision Below Misconstrues Section 3(b) of the NLRA

The decision below endorsed the Board's contorted reading of the delegation, vacancy, and quorum provisions to allow the Board to act with only two members. This holding is premised on the Board's eleventh-hour "delegation" of its authority to a group of three members, one of whose terms was set to expire almost immediately thereafter. According to the decision below, the Board, having once delegated its authority at a time where it had three or more members, could continue to function *in perpetuity* with only two members. This holding is an error because it fails to give effect to the plain meaning of the statute and effectively deletes the first sentence of Section 3(b) from the NLRA.

The D.C. Circuit rightly held to the contrary. Giving meaning and effect to all of the words in the statute, the court explained:

> Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three member group, and this delegee group may act with two members so long as the Board quorum requirement is, "at all times," satisfied.

> *Id. But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.* (Emphasis added). App. 89.

When construing a statute, a court's task is to give effect to the will of Congress. If the will of Congress has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). The decision below fails to give the words in the statute their plain meaning. The language of Section 3(b) is not ambiguous or difficult. The words are clear and simple. As the D.C. Circuit correctly held in *Laurel Baye*, the NLRA explicitly requires the Board to have three members "at all times" in order to function. The decision below wrongly endorsed the Board's linguistic gymnastics and acquiesced to a rewriting of the NLRA. New Process Steel asks this Court to bring clarity and uniformity to federal labor law by granting its petition and vacating the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHELDON E. RICHIE
Counsel of Record
RICHIE & GUERINGER, P.C.
100 Congress Avenue,
Suite 1750
Austin, TX 78701
Tel: (512) 236-9220

BARRY RICHARD
GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32301

JOSEPH W. AMBASH
JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
Tel: (617) 310-6091

May 22, 2009

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 08-3517, 08-3518, 08-3709 & 08-3859

NEW PROCESS STEEL, L.P.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review of an Order of
the National Labor Relations Board

ARGUED APRIL 10, 2009 – DECIDED MAY 1, 2009

Before BAUER, FLAUM, and EVANS, Circuit Judges.

FLAUM, *Circuit Judge*. After negotiating a new collective bargaining agreement with New Process Steel, the owner of a plant in Butler, Indiana, the union representing the employees of that plant took the agreement back to its members. A majority of the union members voted against accepting the contract, which contained substantial take-aways, but an insufficient number voted to strike. So, according to its rules, the union had to accept the contract. New

Process then refused to recognize the contract, claiming that in negotiations they had insisted on "ratification" and that the agreement was several votes short of a majority (and thus unratified). The union's members, unhappy about accepting the contract, then petitioned to decertify the union as their exclusive bargaining representative, and New Process withdrew recognition from the union. The union responded by filing unfair labor practices claims with the NLRB for the company's failure to recognize the collective bargaining agreement and deal with the union as the exclusive representative of the plant's employees, and prevailed before the ALJ and the Board. The company now petitions this court, asking us to find that the agreement was invalid, and the NLRB cross-petitions for an order enforcing its decisions.

For the following reasons, we affirm the NLRB's decisions and enter judgment enforcing its orders in full.

I. Background

New Process Steel (New Process or the company) operates four steel processing facilities in the United States, and one in Mexico. In September 2006, the company needed to negotiate a collective bargaining agreement with the employees at its facility in Butler, Indiana. The International Association of Machinists and Aerospace Workers, AFL-CIO, was certified as the exclusive bargaining representative of those

employees. On or around September 6, 2006, the two sides sat down to begin negotiations. The company was represented by an attorney, Mike Oesterle, and the plant manager in Butler, Steve Hartz. The record does not reveal who initially led negotiations for the union, but in April 2007 Joseph Chaszar took over as the bargaining representative for the union, and he saw the negotiations through to the end.

The parties met approximately twenty-five times during the course of negotiations, which ran from September 2006 to August 2007, and the company ultimately made about forty-six written counter-proposals. As they agreed on terms, the parties had a practice of signing or initialing tentative agreements, known as "TA'ing" a provision. On August 9, 2007, the parties completed their negotiation on the last substantive term, and Chaszar signed the final provision. Chaszar then told the negotiators, "I will agree to your entire proposal" and signed the proposal in its entirety. Chaszar then slid the proposal over to Oesterle, who refused to sign. One of the union representatives angrily demanded, "you [expletive] TA'ed everything else, why don't you sign off on this so we can get out of here?" Chaszar also asked why the company's representatives refused to sign, given that the parties had previously signed off on all proposals that they had agreed to. Oesterle told the union negotiators that once the contract was ratified the company would sign it. Chaszar said he wanted to hold a union vote that day, but the company insisted that they had production scheduled and the union

would "have to do it on your own time."[1] Chaszar scheduled the vote that weekend.

The administrative law judge found that this was the only time the parties verbally discussed the idea of ratifying the contract, and this discussion did not include the form that union ratification should take. The parties had exchanged written documents referencing the idea three times, however. One of those exchanges was in the final proposal: a condition that the wage agreement went into effect "[b]eginning the effective date of this agreement, or on the date the total Agreement is properly ratified, signed and executed, whichever is later. . . . " The employer's initial set of bargaining proposals from October 2006 also provided that, "[i]t is the company's position that these agreements will not become contractually effective until the day and date that a total agreement on all parts of the contract is reached, ratified, and signed by the parties." Finally, in a letter from July 2007 that Oesterle wrote summarizing the progress of negotiations, he again stated that, [t]he company proposes a one-year deal, effective the date the contract is signed, executed, and ratified, whichever is later."

---

[1] New Process' representatives explained that they insisted on union ratification because they had heard grumbling about the union among employees. Hartz told the ALJ that, "There was a lot of talk in the shop about [ ] decertifying . . . and . . . this contract had a lot of take-aways and . . . [New Process wanted] to make sure they had an opportunity to, you know, voice their opinion, and vote for the contract and let their voice be heard."

However, the letter listed this as an "open" proposal, meaning it was one that the company had offered but that the union had not yet accepted.

The union held its vote on Sunday, August 12 at a local hotel, with about twenty-three employees in attendance (the Butler facility had approximately thirty-two employees total). Cheszar [sic] started the vote by explaining how the process would work. First, the employees would vote on the contract. If a majority of the employees did not vote to approve the contract, the union would then take a vote to strike. Union by-laws required a two-thirds vote in order to strike. If the employees did not vote to approve the contract but also did not pass a strike resolution, the union would accept the contract. This procedure, which Cheszar [sic] explained at the beginning and end of the meeting, is contained in a printed union circular. The rule has a simple rationale: IAM believes that if employees vote not to accept a contract but also do not pass a resolution to strike for better terms, the union negotiators lack the necessary leverage to negotiate a more favorable agreement and must accept the contract proposal that they have in hand.

After Chaszar outlined the terms, the union conducted a secret ballot vote on the contract. The employees rejected the proposal by a margin of about one or two votes. Chaszar then explained that they were going to take a strike vote, and that a two-thirds majority was needed for that resolution to pass. The strike resolution failed. The union representatives told the employees that the contract was enacted,

because the union did not have enough votes to go on strike. Chaszar called New Process later that day and told them they had an agreement. New Process' representatives then executed the collective bargaining agreement.

A few days later, Hartz called New Process' CEO at the corporate headquarters in Houston and told him about some employee complaints he had received regarding the manner in which the union accepted the contract. On September 11, 2007, New Process' outside legal counsel sent Cheszar [sic] a letter stating that the company was resuming negotiations and did not accept the latest agreement because it had not been ratified by a majority vote. "Since ratification was an express precondition to the agreement," the letter concluded, "it is clear that there is not nor has there ever been a contract between the company and the union." The company informed the union the next day, September 12, that it had received a decertification petition from the employees of the Butler facility and was withdrawing its recognition from the union as a result.

The IAM then filed an unfair labor practices charge with the National Labor Relations Board (NLRB or Board) on September 17, 2007, and the general counsel of the NLRB issued a complaint based on that charge. The NLRB alleged that New Process violated § 8(a)(1) and (5) of the National Labor Relations Act by wrongfully repudiating a valid collective bargaining agreement, and § 8(a)(1) and (5) and § 2(6) and (7) of the NLRA by withdrawing

recognition from the union. New Process filed an answer denying all of the allegations. The matter was tried before an Administrative Law Judge who issued findings of fact and conclusions of law with respect to the complaint, ruling that the ratification-by-majority-vote provision that New Process insisted was a condition of the agreement had not been agreed on by both parties and that New Process lacked standing to raise other complaints about the ratification process that the union employed. New Process then appealed the decision of the administrative law judge to the NLRB. The Board adopted the ALJ's findings and conclusions. In a separate decision, the Board also ordered New Process to cease and desist from its refusal to deal with IAM as the bargaining representative of its employees. The NLRB concluded that New Process and IAM had enacted a valid collective bargaining agreement and that the union enjoyed "a conclusive presumption of majority status" during the term of a collective bargaining agreement. New Process sought review of the NLRB's decisions in this court, and the Board petitioned for orders enforcing its judgment. Those cases are consolidated in this appeal.

II. Discussion

This court applies a circumscribed standard of review to rulings of the NLRB. *SCA Tissue North America LLC v. NLRB,* 371 F.3d 983, 987 (7th Cir. 2004). We review its factual findings for substantial evidence and its legal rulings for a reasonable basis

in law. *Sears, Roebuck & Co. v. NLRB,* 349 F.3d 493, 502 (7th Cir. 2003). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion of the Board." *Huck Store Fixture Co. v. NLRB,* 327 F.3d 528, 533 (7th Cir. 2003). Under the substantial evidence test, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera v. NLRB,* 340 U.S. 474, 488 (1951); *see also NLRB v. Nevada Consolidated Copper Corp.,* 316 U.S. 105, 106 ("If the findings of the Board are supported by evidence the courts are not free to set them aside, even though the Board could have drawn different inferences."). When the board adopts an ALJ's findings of fact and conclusions of law, as it did here, we review those determinations. *Sears, Roebuck,* 349 F.3d at 508.

A. NLRB's jurisdiction

New Process' first objection to the NLRB's orders is that it lacks authority to issue them in the first place. A little background information is needed for this argument. The NLRB, by statute, consists of five members. Those members are appointed by the President with the advice and consent of the Senate and serve staggered five year terms. 29 U.S.C. § 153(a). Also by statute, the NLRB is allowed to delegate the authority of the five member body to smaller, three

member panels. This delegation process was spelled in § 3(b) of the NLRA:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b). On December 28, 2007, with one seat already vacant and another member's term about to expire, the four members of the Board delegated all of its authority to a three member panel. When the recess appointment of one member of that group of three expired three days later, the remaining two members proceeded as a quorum. As of January 2009, the NLRB had issued over 300 opinions, both published and unpublished, through this two-member quorum. New Process alleges that this delegation procedure violates both the plain meaning of § 3(b) of the NLRA and the purpose of that act as embodied in the relevant legislative history because it was in fact a delegation to a two-member panel rather than a three-member panel.

We begin with the plain meaning of the statute. New Process claims that the Board's delegation was improper in the first instance. The third member,

whose term was about to expire, was in New Process' view a phantom member who would not actually consider the cases before the Board. New Process claims that this procedure violated the plain meaning of the first sentence of the act because it is not a delegation to "three or more" members of the NLRB, but only to two members. The upshot of New Process' view, as their counsel explained at oral argument, is that the first sentence of § 3(b) restricts the Board from acting when its membership falls below three.

The NLRB argues that the statute at issue is clear that the vacancy of one member of a three member panel does not impede the right of the remaining two members to execute the full delegated powers of the NLRB. As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text. As we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members.[2] The plain meaning of

---

[2] Contrary to New Process' assertions, this reading does not deprive the first sentence of the section of its meaning. The first sentence establishes a requirement for delegation in the first instance, while the vacancy and quorum provisions allow the

(Continued on following page)

the statute thus supports the NLRB's delegation procedure.

This reading is also in line with the two other circuit courts to consider this issue. Because the NLRB has been issuing decisions through a two-member quorum since 2007, the issue is pending in several circuits at this time.[3] The First Circuit is so far the only one to address the issue in a published opinion. In *Northeastern Land Services v. NLRB,* No. 08-1878 (1st Cir. 2009), the court held that, "[t]he Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)." *Slip op.* at 11. As the First Circuit pointed out, this result is also consistent with an Office of Legal Counsel memorandum concluding that, "In our view, if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." Quorum

---

Board to proceed in the event that the terms of Board members subsequently expire. New Process' reading, on the other hand, appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.

[3] The D.C. Circuit heard oral argument on this issue in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB,* Nos. 08-1162, 08-1214, while the Second and Eighth Circuits have pending cases raising the same issue. *Snell Island SNF v. NLRB,* No. 08-3822, 08-4336 (2nd Cir.); *NLRB v. Whitesell Corp.*, No. 08-3291 (8th Cir.).

Requirements, Memorandum from M. Edward Whelan III, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, (Mar 4. 2003), *available at* 2003 WL 24166831.

In a case decided well before the current vacancies, the Ninth Circuit upheld the NLRB's ability to act in panels of two if there is a resignation or vacancy in a properly constituted panel of three. *Photo-Sonics Inc. v. NLRB,* 678 F.2d 121 (9th Cir. 1982). The petitioner in *Photo-Sonics* argued that the order in that case was invalid because one member of the panel of three left the Board prior to the release of the decision. *Id.* at 122. The Ninth Circuit rejected that argument, holding that under § 3(b) two members was a quorum and that courts had interpreted quorum as "the number of the members of the court as may legally transact judicial business." *Id.* (quotation omitted). New Process attempts to distinguish *Photo-Sonics* by arguing that the third Board member in that case participated in the underlying decision, while in this case the decision was made by a panel of two. By its terms, however, § 3(b) contains no requirement about whether a vacant Board member needs to have heard evidence or participated in a decision in order for the quorum requirement to apply. As long as the panel consisted of three NLRB members at the time it was constituted, *Photo-Sonics* is persuasive authority endorsing the NLRB's reading of the statute.

When the plain meaning of a statute is unambiguous, we need not consider a statute's legislative

history or analogous cases in order to interpret it. *See United States v. Easter*, 553 F.3d 519, 526 (7th Cir. 2009) ("Where, as here, the plain meaning of the statute is unambiguous, that is the end of the matter."). However, we also take time to note that the legislative history behind § 3(b) does not support New Process' reading of the statute. § 3(b) of the NLRA was amended by the Taft-Hartley Act, which expanded the size of the NLRB from three members to five. The Taft-Hartley Act itself was a compromise between competing House and Senate revisions of the original National Labor Relations Act. The House version created a Labor-Management Relations Board of three members whose sole duty was to decide cases. H.R. Rep. No. 80-245, at 25 (1947). The Senate version expanded the size of the NLRB from three members to seven but included the delegation and quorum provisions. S. Rep. 80-105, at 19 (1947). The eventual bill, which expanded the NLRB to five members, was a compromise between the two versions.

New Process insists that the Taft-Hartley revisions were designed to make the NLRB function more like a court of appeals and to bring a greater variety of opinions into the review of administrative decisions. It is true that the Congressional framers of the Taft-Hartley Act were concerned with the quality of the adjudicative work of the Board, but their primary concern was increasing the efficiency of the Board.[4]

---

[4] The House's report on the proposed bill clearly expressed misgivings with the construction of the Board under the Wagner

(Continued on following page)

"There is no field in which time is more important, yet the Board is from 12 to 18 months behind in its docket. . . . The expansion of the Board from three to seven members, which this bill proposes, would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage. . . ." S. Rep. No. 80-105, at 8 (1947). The purpose of the revisions, then, was to allow the NLRB to hear more cases by creating panels of the entire Board. There is no suggestion in the relevant reports that the Board is restricted from acting when its membership falls below a certain level, as New Process would have it. Indeed, a court interpreting the statute that way would hinder the efficient panel operation that Congress intended to create. *See also Hall-Brooke Hospital v. NLRB,* 645 F.2d 158, 162 n.6 (2d Cir. 1981) ("Congress added [§ 3(b)] to the NLRA to enable the Board to handle an increasing caseload more efficiently.").

To find support for its reading of the statute in the legislative history, New Process would need statements establishing that the Board was forbidden

---

Act, arguing that, "[a]cting as prosecutor, judge, and jury, and to all intents and purposes its own Supreme Court insofar as its findings of fact are concerned, the Board seems to have found the temptation to be arrogant, arbitrary, and unfair irresistible." H.R. Rep. No. 80-245, at 25 (1947). Congress saw the remedy to this problem in structural changes to the Board, however, such as abolishing the Review Division. *Id.* The House Report did not even mention any vacancy or quorum provisions in its discussion of the proposed changes to § 3. *Id.*

from operating with a quorum of two, or that Congress was particularly concerned about delegating authority to Board members whose term was about to expire. They have produced nothing to that effect. To the extent that the legislative history points either way in this case, then, it establishes that Taft-Hartley created a Board that functioned as an adjudicative body that was allowed to operate in panels in order to work more efficiently. Forbidding the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would thus frustrate the purposes of the act, not further it.

Finally, New Process argues that the NLRB's delegation process is invalid because the Supreme Court has disapproved of similar "quorum" procedures in analogous situations. They rely on the Supreme Court's decision in *Nguyen v. United States,* 539 U.S. 69 (2003), which held that a circuit court of appeals could not operate with a panel of two Article III judges and a third Article IV judge. The statute at issue in *Nguyen,* 28 U.S.C. § 46, requires "the hearing and determination of cases and controversies by separate panels, each consisting of three judges." 28 U.S.C. § 46(b). The Court held that a panel consisting of fewer than three judges was not a properly constituted panel even if two Article III judges constituted a quorum of a panel of three.

There are two ways to distinguish *Nguyen* from the present case. First, 28 U.S.C. § 46 contains no delegation or quorum clauses, simply a requirement that panels consist of three judges. Second, the Court

in *Nguyen* found while examining the legislative history that Congress amended 28 U.S.C. § 46 in part because of concerns about circuits routinely assigning cases to panels of two. *Nguyen,* 539 U.S. at 83. But § 3(b) was not motivated by similar concerns, and indeed contains quorum and delegation clauses that cover the scenario at issue here.

Additionally, a number of administrative law opinions hold that a public board has the authority to act despite vacancies because the board, rather than the individual members, has the authority to act, a principle that suggests the NLRB has the authority to act so long as they have satisfied the quorum requirements. *See, e.g., FTC v. Flotill Prods., Inc.,* 389 U.S. 179, 183-86 (1967) (common law quorum rules apply to public bodies). This principle is borne out in other court decisions allowing administrative agencies to operate with a quorum of remaining members. *See Falcon Trading Group, Ltd. v. SEC,* 102 F.3d 579, 582 (D.C. Cir. 1996) (SEC allowed to create quorum rules permitting the commission to operate with only two of five members); *Railroad Yardmasters of Am. v. Harris,* 721 F.2d 1332, 1335 (D.C. Cir. 1983) (National Mediation Board allowed to operate with only one of three members).

We ruled on a similar issue in *Assure Competitive Transp. Inc. v. United States,* 629 F.2d 467, 473 (7th Cir. 1980). *Assure* concerned the Interstate Commerce Commission, which by statute has eleven members but, because of vacancies, had dwindled to six members by the late 1970s. The ICC asked Congress to

amend the statutory language of its quorum rules to allow the commission to act with a quorum of the remaining commissioners rather than with a quorum of the entire number of seats on the board. *Id.* at 474. This court held that the quorum rules permitted the ICC to act with fewer than the full complement of the six remaining board members, so long as a quorum of the current board was present. *Id.* New Process argues that this actually undercuts NLRB's position, because the ICC went to Congress for permission to act with a quorum of the remaining board, which the NLRB did not do. This argument presumes, however, that the NLRB is acting outside of its statutory authority or that, in other words, we accepted New Process' plain meaning argument. Given that the plain meaning of the statute supports NLRB's reading of the statute, New Process' interpretation of *Assure* is unpersuasive.

We thus find that the NLRB had authority to hear the labor dispute in this case and to issue orders regarding the unfair labor practices claim and New Process' withdrawal of recognition from the union, and proceed to the merits of the case.

B. Validity of the collective bargaining agreement

New Process' argument on the merits consists of two claims. First, they argue that because ratification of the contract was a condition precedent to implementation of the agreement, the agreement between

New Process and the union was never final. Second, they argue that if the union believed that the phrase "ratification" did not mean a straight up-or-down vote by the union's members that there was no "meeting of the minds" between the union and New Process and thus no valid agreement.

1. Meaning of "ratification"

The ALJ rejected New Process' argument that there was never a valid contract between New Process because the union never "ratified" the contract according to the terms of the parties' agreement. The ALJ found that the three references to "ratification" during the course of the negotiations were cursory and did not include an agreement on the procedure or method for ratification. In the absence of such an agreement, the ALJ determined that the IAM was allowed to select its own method of ratification and that New Process did not have standing to object to that method.

The NLRB has traditionally insisted that the method of ratification a union chooses to employ is a matter between the union and its members and not something the company can question. *See Childers Products Co.*, 276 NLRB 709, 711 (1985) ("the method of ratification was within the [u]nion's exclusive domain and control . . . "); *see also Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126, 1127 (2007) ("Board law is clear that [employer] has no standing to challenge [the union's] ratification

process."). Nor is a company allowed to challenge whether a union properly followed its own internal ratification procedures. The litigants with standing to make that challenge are the members of the union themselves, not their employer. *See Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). The reason that the union is given such wide latitude is concern for union independence. Federal labor law has a general policy forbidding employers to place conditions on how a union structures its internal relations with its own members, lest a company subvert the union and create a structure whereby it deals with employees directly. *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958).

New Process now argues that the ALJ's decision was inconsistent with prior decisions from the NLRB, in particular *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991) and *Hertz Corporation*, 304 NLRB 469 (1991). In *Beatrice*, the Board dismissed similar allegations against an employer who refused to recognize a collective bargaining agreement. During negotiations over that agreement, the parties explicitly agreed that the contract would have to be ratified by the members of the bargaining unit (as opposed to just the members of the union, a key difference) and set this agreement down in a memorandum. *Beatrice*, 302 NLRB at 224. The bargaining unit employees repeatedly rejected the contract until the union obtained what it took to be sufficient ratification from the members of the union itself, although the "ratification" was actually the vote of a single individual.

Id. The NLRB held that when the parties have agreed on a method and process for ratification, an employer can rightly insist that the method be followed before it recognizes the collective bargaining agreement. *Id.* at 225. In *Hertz,* a union and an employer expressly agreed that a tentative collective bargaining agreement was not effective until it was ratified. *Hertz,* 304 NLRB at 472. The union, however, never held a ratification vote on the agreement. *Id.* at 471. The Board held that an employer's refusal to recognize the agreement was not an unfair labor practice where the parties agreed upon ratification as a condition precedent and the union failed to satisfy that condition. *Id.* at 469.

New Process does not contend that the discussions produced an agreement defining "ratification," but they claim that the term is well-established within labor relations negotiations, and means a straight up-or-down vote by members of the union. The ALJ and the Board, however, did not agree that the meaning of the term is so obvious nor that it has a prevailing meaning. They found that New Process' definition is not unreasonable, but that it is "contrary to the way the IAM and other unions proceed." Indeed, other decisions from the NLRB refer to similar multi-step ratification methods. *See Childers Products Co.,* 276 NLRB at 711.

The factual finding here is supported by substantial evidence. The record reflects that three

counter-proposals from New Process referred to "ratification."[5] None of those counter-proposals, however, referred to a method of ratification. New Process only discussed its desire to make ratification a condition precedent after the parties completed negotiation, and there the discussion was about ratification, full stop, with no discussion of process or method. New Process argues that Chaszar, in his deposition testimony, admitted that he understood "ratification" to mean a majority vote on the contract and that this condition was not satisfied. However, the phrase he was actually asked about was "a vote," which he took to mean majority rule. With respect to ratification, Chaszar testified that he meant "how we process our ratification," and that, "[i]f it was a positive vote, we had an agreement. If it was a negative vote, we go to the second vote," although he did say that he did not go over this process with the company's representatives. That is not clearly committing to New Process' preferred ratification method. Nor would a union negotiator's tacit understanding necessarily be binding when the union already has a method for ratifying contract proposals.

The Board's conclusion that New Process cannot refuse to recognize the contract because the union did not follow the company's definition of ratification also

---

[5] Those three counter-proposals were in New Process' opening bargaining proposal in 2006, on page eighteen of its July 2007 letter summarizing bargaining, and the wage provision of the tentative agreement.

has a reasonable basis in law. Long-standing precedents provide a basis for the Board's ruling that New Process cannot insist on any particular method of ratification. *See, e.g., Childers Products Co.,* 276 NLRB at 711. New Process argues throughout their brief that the Board has essentially overruled *Beatrice* and *Hertz* and thus acted arbitrarily. An agency of course has a "duty to explain its departure from prior norms," *Atchison, T.&S. F. R. Co. v. Wichita Board of Trade,* 412 U.S. 800, 808 (1973), but the ALJ's decision below contains a long discussion of the meaning of *Beatrice* and *Hertz* and distinguishes them from the present case. New Process relies heavily on a line from a concurring opinion in *Beatrice,* stating that "[i]f indeed the parties have made employee ratification a part of the bargain, it is altogether appropriate that the Board give a measure of protection to the expectancy interests of the parties." *Beatrice,* 302 NLRB at 227 (Chairman Stephens, concurring). We agree with the Board and the ALJ, however, that this case did not involve an express agreement on a method of ratification, as *Beatrice* did, and that the union satisfied the ratification condition by following its two-step procedure.[6] In the

---

[6] New Process also argues that the IAM did not follow the ratification procedure; the union's circular requires the union to hold two strike votes, at the beginning and end of the vote on accepting the contract, while the union only held one. New Process, however, does not have standing to raise this claim, as it is a matter between the union and its members. *Martin J. Barry Co.,* 241 NLRB at 1013. New Process certainly does not

(Continued on following page)

absence of an express agreement otherwise, the ratification procedure was a matter within the union's control.

2. No "meeting of the minds"

New Process argues in the alternative that there was simply no agreement between the company and the union: New Process meant ratification to mean an up or down vote and the IAM apparently meant a different process, and because of this disparity there was no meeting of the minds and thus no contract. The Board argues that a party's subjective understanding of a term cannot prevent a "meeting of the minds" because in federal labor law, as in common law, an agreement is judged by conduct evidencing an agreement rather than a party's subjective belief. *See MK-Ferguson Co.*, 296 NLRB 776 n.2. As the Board argues to this court, if New Process wanted a straight up-or-down vote, it should have asked for one.

New Process, of course, claims that it did just that when it asked for ratification. The company has difficulty finding evidentiary support for that claim, however. The ALJ discredited Hartz's claim that his "unexpressed understanding" throughout negotiations was an up-or-down ratification vote, and that credibility determination removed much of the factual support from New Process' claims about the

---

claim an express bilateral agreement that the union would follow that ratification procedure.

meaning of ratification. Again, there is substantial evidence in the record supporting the ALJ's finding that the parties did not negotiate a meaning of "ratification" or a process for going about it, and the legal conclusion that the union was free to employ its own method of ratification is reasonable given the Board's precedents.

We affirm the Board's order finding that New Process violated § 8(a)(1) and (5) of the NLRA by repudiating the collective bargaining agreement.

C. Recognition of union

New Process also appeals from the Board's order forcing it to recognize the IAM as a valid collective bargaining representative for employees in the Butler plant. New Process withdrew recognition from the union on September 12, 2007 because it had received an employee decertification petition protesting what the employees saw as excessive give-backs in the contract and an objectionable ratification procedure. The Board determined that the company could not withdraw recognition from the union so long as a valid collective bargaining agreement was in effect. The "contract bar" rule prevents an employer from petitioning for decertification of a union as an exclusive bargaining representative during the life of a collective bargaining agreement, and one consequence of that rule is that an employer cannot withdraw recognition from the union, either. *See Auciello Iron Works v. NLRB*, 517 U.S. 781, 785 (1996); *see*

also NLRB v. Dominick's Finer Foods, Inc., 28 F.3d 678, 683 (7th Cir. 1994).

Because of the contract bar, this issue turns on the validity of the collective bargaining agreement. If the agreement was valid, then the contract bar prohibited New Process from withdrawing recognition from the union. If not, then the company was free to do so. Here, since we affirm the Board's determination that New Process and the union entered into a valid one-year collective bargaining agreement in August 2007, we affirm the Board's determination that New Process wrongfully withdrew recognition from the union in September 2007.

III. Conclusion

For the foregoing reasons, we AFFIRM the decision of the Board and enter judgment enforcing its orders in full.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

New Process Steel, LP[1] ***and*** **District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO.** Case 25-CA-30470

September 25, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On May 1, 2008, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply.

---

[1] In several of the General Counsel's submissions to the Board, the Respondent is identified as New Process Steel of Indiana, Inc. We note that the Respondent's correct name, as reflected in the caption above, is New Process Steel, LP.

The National Labor Relations Board[2] has considered the decision[3] and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order.[5]

---

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] Although Chairman Schaumber agrees with the judge that the Respondent unlawfully repudiated the contract, he does not rely on a number of the judge's statements. For example, the judge expressed doubts and engaged in extensive discussion about whether the parties agreed to contract ratification despite Union Negotiator Chaszar's specific testimony that he agreed to the Respondent's requirement that ratification was a condition precedent to the contract, and despite the judge's acknowledgement that he need not reach the issue. Furthermore, the judge questioned the Respondent's professed concern for its employees' rights by speculating that its real motivation for refusing to sign the contract was getting rid of the Union.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, New Process Steel, LP, Butler, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 25, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Fredric D. Roberson, Esq., for the General Counsel.

Joseph W. Ambush, Esq. (Greenberg Traurig, LLP.), of Boston, Massachusetts, and *Sheldon E. Richie, Esq. (New Process Steel)*, of Austin, Texas, for the Respondent.

DECISION

STATEMENT OF CASE

DAVID I. GOLDMAN, Administrative Law Judge. This case arises from an employer's repudiation of an initial collective-bargaining agreement reached with its employees union. At the conclusion of 11 months of collective bargaining the Union agreed to the employer's contract proposal which contained what the

employer's bargainer called "a lot of take-aways." When the Union accepted this offer, the employer, admittedly motivated by the approaching expiration of the certification year bar and "chatter" about a decertification petition, resisted initialing the agreement, saying it would sign after ratification. The union put the agreement to a vote of employees and, following its established procedures, when less than a majority voted in favor of the contract, this triggered a strike vote requiring supermajority approval, and failing to garner approval for the strike, the contract was deemed accepted. The acceptance was reported to the employer which executed and implemented the agreement. However, a few weeks later, after investigating the procedure followed by the Union for ratifying the contract, the employer declared the contract ineffective.

The Government contends that the employer was required to abide by the agreement reached with the Union and executed after the Union advised the employer of the completion of its contract ratification procedures. The employer contends that a favorable vote on the agreement by employees was an agreed-to condition precedent of the contract, and the union's failure to secure such a vote means that the contract never came into effect. Alternatively, the employer contends that if a favorable vote by the employees in favor of the agreement was not a condition precedent of the agreement, then there was not a "meeting of the minds" between the parties and no contract formed on that basis.

FINDINGS OF FACT

Based on an unfair labor practice charge filed September 17, 2007, by District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM or Union), the General Counsel of the National Labor Relations Board (Board) issued a complaint on December 28, 2007, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by New Process Steel, LP (NPS, Employer, or Company). NPS filed a timely answer to the complaint denying all violations of the Act. This dispute was tried in Auburn, Indiana, on March 11, 2008. Counsel for the General Counsel and the Respondent filed briefs in support of their positions on April 15, 2008. On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, I make the following findings of fact, conclusions of law, and recommendations.[1]

The complaint alleges, Respondent admits, and I find that at all material times NPS has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, the Respondent admits, and I find that the Union at all material times has been a labor

---

[1] Respondent filed a posthearing motion to correct the record. That motion is granted. Accordingly, "no" is added as the last word to LL. 3 on p. 15; at LL. 19 of p. 15 "unratified" is inserted in place of "ungratified"; all references in the transcript to the name "Proche" are corrected to read "Proch."

organization within the meaning of Section 2(5) of the Act.

JURISDICTION

New Process Steel operates five steel processing facilities, four in the United States, and one in Mexico. This case concerns events at its Butler, Indiana facility.

The Union was certified as the exclusive bargaining representative of a bargaining unit of NPS's Butler, Indiana employees on August 25, 2006.[2] Bargaining for a first contract began on or about September 6, 2006. Attorney Mike Oesterle was NPS's lead negotiator and bargaining table spokesperson. Butler facility Plant Manager Steve Hartz was the other member of the NPS bargaining team. Beginning in April 2007, the Union's chief negotiator was Joseph Chaszar, a representative from the Machinist Union. Throughout the negotiations the parties "T/A'ed" – i.e., signed or initialed tentative agreement to –

---

[2] The bargaining unit represented by the Union consisted of:

> All full-time and part-time production and maintenance employees employed by Respondent at its Butler, Indiana facility, but excluding all office clerical employees, professional employees, sales representatives, managerial employees, team leaders, guards, supervisors as defined by the Act, and all other employees.

discrete contract provisions as agreement was reached on particular provisions.

The parties met approximately 25 times between September 2006 and August 2007, and by July 31, the Company had offered at least 46 written counter-proposals to the Union. At the final bargaining session, Thursday, August 9, 2007,[3] the parties discussed whether to include a union security clause. NPS stuck by its proposal – not to have union security – and ultimately Chaszar told Oesterle, "Fine, I agree to it, to your proposal." Chaszar signed the provision. Chaszar then told the NPS negotiators, "I will agree to your entire proposal" and Chaszar signed the Employer's outstanding proposal in its entirety. Chaszar then slid the proposal over to Oesterle and asked him to sign it. Oesterle refused to sign, and one of the union negotiators, Mike Hall, angrily denounced Oesterle, shouting, "[Y]ou fucking T/A'ed everything else. Why don't you sign off on this so we can get out of here." Chaszar also asked why, remarking to Oesterle that "up until this point, we have agreed to sign off on all proposals that both parties agreed to." Oesterle replied that "once the agreement is ratified, we will be glad to sign it." Chaszar's response was "we would like to vote the contract today." However, Oesterle told Chaszar that "We have production scheduled. We can't do it today.

---

[3] All subsequent dates refer to 2007, unless otherwise indicated.

You are going to have to do it on your time." Chaszar asked if work was scheduled for the coming weekend and Hartz told him it was not. Chaszar said, "Fine, then we will schedule the vote for this weekend."

This exchange during the final bargaining session was first and only time in negotiations that the subject of the agreement's ratification was verbally mentioned between the parties. At no time was there discussion of the ratification procedures the Union would employ, or discussion of its standard procedures used in contract ratification, or anything else, relating to ratification.

While there had been no mention of ratification or ratification procedures, three documents exchanged during negotiations referenced ratification. One was in the final proposal accepted by the Union. This was the "wages" provision of the agreement, which included a reference to ratification, stating "[b]eginning the effective date of this Agreement, or on the date the total Agreement is properly ratified, signed and executed, whichever is later [the Company agrees to pay specified wages].

A second ratification reference was contained in the Employer's initial set of bargaining proposals, provided to the Union in October 2006. This stated:

> As proposals are considered by the parties, agreements on Articles an[d]/or Sections of the proposed labor contract will probably occur on a clause-by-clause basis. It is the Company's position that these agreements

> will not become contractually effective until the day and date that a total agreement on all parts of the contract is reached, ratified, and signed by all parties.

Finally, the Company referenced ratification in an 18-page single-space letter written by NPS negotiator Oesterle on July 31, 2007, in which he indepthly summarized the status of negotiations and the parties' positions. That letter included a summary of the parties' positions on the provision "parties and terms of agreement" and included the statement that "[t]he Company proposes a one-year deal, effective the date the contract is signed, executed, and ratified, whichever is later." This provision, "parties and terms of agreement" was listed in the Company's letter as an "open" proposal, i.e., one on which no agreement had been reached. There was no reference to ratification contained in the final Company proposal on this provision accepted by the Union (R. Exh. 2 at numbered p. 1). None of these three written references to ratification was discussed by the parties.[4]

---

[4] Hartz repeatedly testified, in blatantly self-serving testimony cued by Respondent's counsel, that his "understanding" of these written but undiscussed references to "ratification" was "that there would be a positive vote" by employees. (Tr. 45, 47, 49.) Similarly, Hartz testified that his understanding was that in order for the contract to be effective that there had to be "a favorable vote for the contract." (Tr. 39.) This "understanding" was not shared with the Union during bargaining, or with anyone, as far as the record reveals. I do not credit this testimony, based on the demeanor with which it was offered, how it was elicited, and its overall lack of plausibility. Hartz maintained in

(Continued on following page)

At the trial, Plant Manager Hartz explained the Respondent's motive for wanting a vote of employees as a condition for the contract's effectiveness: "There was a lot of talk in the shop about [ ] decertifying . . . and . . . this contract had a lot of take-aways and . . . [we w]anted to make sure they had an opportunity to, you know, voice their opinion, and vote for the contract and let their voice be heard."

The Union scheduled a meeting and vote for Sunday, August 12, at a hotel in nearby Auburn, Indiana. Approximately 23 employees attended the meeting. At the meeting, the Union followed its standard procedure in contract ratification situations. As Chaszar explained, "All of the contracts that we ratify, we ratify in the same manner." Pursuant to these procedures, which are described in an IAM "circular," an agreement that is not accepted by a majority of those voting, triggers a strike vote:

> In the event that a strike vote fails to carry by the required two-thirds (⅔) majority vote, *the collective bargaining agreement at issue will be accepted.* This is because without the necessary membership support for a strike,

---

his testimony that requiring employees to vote on the contract was an important issue to NPS. As an experienced bargainer, Hartz would not have left an important issue, and an understanding that the Respondent claims to have relied upon, to the unexpressed understandings of one side of the bargaining table. In any event, as discussed herein, Hartz's unexpressed understanding is of no relevance to the outcome of the issues in this case.

> our negotiators have no strength from which to insist on our bargaining demands. . . . Again, lodges are reminded that if the strike vote fails to carry, no strike sanction will be granted, and the contract will be accepted.

(Emphasis added in original.)

At the meeting, Chaszar

> explained what we were going to do, the agenda for the day, which is we were going to go over the proposals, give everybody an opportunity to ask questions, and go into a vote which would be a secret ballot, and we also then explained what would happen if that vote failed, that we would have a second vote, which would be a vote to strike or not to strike.

It was explained at the meeting, at the beginning, and at the end, that if the employees voted down the contract, but then did not vote to strike by two-thirds majority, that the contract would be accepted by the Union. This ratification process is followed by IAM Locals around the country and, according to Chaszar, used consistently at least as long as long as he has been on staff.

After an explanation of the contract the Union conducted a secret vote among those present. The employees rejected the contract by one or two votes, meaning the votes in favor of the contract were not 50 percent plus one. At that point the Union explained, for the second time, that they were going to take a

second vote, a strike vote, and that a two-thirds vote to strike was required for a strike to be initiated. That vote was then conducted, again by secret ballot, and that vote did not receive the number required to go on strike. At that point, the Union told the employees that "the contract was enacted, because we don't have enough to go out on strike."

Later that day, Chaszar called Oesterle and said that "we have an agreement." NPS executed the agreement.

During that week, Hartz called NPS's CEO Bob Proch at NPS's corporate headquarters in Houston. Hartz told Proch "some of the things that I had heard that had happened during the ratification" and asked Proch "is there something you can do to look into it and investigate." Hartz told Proch in an e-mail "the employees are asking for help. Is there something we can do?" At that point, Hartz is "sure" counsel was involved and he "assumes" an investigation was launched. By letter dated September 11, NPS's attorney, Joseph Ambash, wrote to Chaszar announcing his assumption of the role of chief negotiations representative for NPS and articulating the position on the agreement that NPS maintains to this day:

> As you know, the tentative agreement reached between the parties on August 9, 2007[,] was expressly subject to ratification by members of the bargaining unit. On August 12, 2007[,] you notified the company's then-negotiator that the parties had an agreement, whereupon Mr. Hartz executed

the purported contract on behalf of the company.

It has come to the company's attention that, in fact, members of the bargaining unit voted *not* to ratify the contract. Apparently, you and other union representatives then told employees they were required to take a strike vote, and if the strike vote did not pass by a two-thirds majority, the tentative contract would then go into effect. When the contract ratification vote and strike vote failed, you nonetheless falsely told the company's then-negotiator that the parties had reached an agreement.

Since ratification was an express precondition to the agreement, it is clear that there is not nor has there ever been, a contract between the company and the union.

Should you wish to resume negotiations, please contact me.

(Emphasis added in original.)

Discussion

The question in this case is whether the parties formed a valid collective-bargaining agreement. If so, the Employer's admitted repudiation of the agreement violates Section 8(a)(5) of the Act. See *Valley*

Central Emergency Veterinary Hospital, 349 NLRB 1126 (2007).[5]

"'Federal labor policy encourages the formation of collective-bargaining agreements,' and '[i]t is the Board's obligation to "protect the process by which employers and unions may reach agreements with respect to terms and conditions of employment."'"[6] In carrying out the obligation to encourage and protect the process of forming collective-bargaining agreements, the Board has always been clear that the Act imposes no requirement of employee or union member ratification of collective-bargaining agreements.[7]

The reason for this is that the "subject is unrelated to wages and terms and conditions of employment." *C & W Lektra Bat Co.*, 209 NLRB 1038, 1039 (1974), enfd. 513 F.2d 200 (6th Cir. 1975); *Houchens Market of Elizabethtown, Inc.,* 155 NLRB 729, 730 (1965), enfd. 375 F.3d 208 (6th Cir. 1967). Unless the

---

[5] An employer that violates Sec. 8(a)(5) also derivatively violates Sec. 8(a)(1). *ABF Freight System,* 325 NLRB 546 fn. 3 (1998).

[6] *Valley Central Emergency Veterinary Hospital,* 349 NLRB at 1127, quoting, *American Protective Services,* 319 NLRB 902, 904 (1995) (fn. omitted).

[7] *North Country Motors Ltd.*, 146 NLRB 671, 674 (1964) ("The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf"); *Teamsters v. NLRB,* 587 F.2d 1176, 1182 (D.C. Cir. 1978) ("The Labor Act does not require a union to accord its rank-and-file members the right to ratify a collective-bargaining contract which it has negotiated").

union and employer have agreed otherwise, "ratification is an internal union matter which is not subject to question by an employer." *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). As the Supreme Court has explained, in a discussion of a contractual "ballot clause" similar to a ratification provision, such a clause

> deals only with relations between the employees and their unions. It substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative.

NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 350 (1958).

Notwithstanding these policy concerns, as with other nonmandatory or permissive subjects of bargaining, the parties are free to bargain about and reach agreements, regarding the presumptively internal union issue of ratification.[8] Accordingly, "[an] employer [does] not violate Sec. 8(a)(5) by refusing to execute a bargaining contract which the parties had agreed would be subject to ratification by unit

---

[8] Of course, as with any nonmandatory subject of bargaining, a party may not insist to impasse or condition negotiations or overall agreement on the other party's acceptance of a contractually enforceable ratification provision. See *Borg-Warner Corp.*, supra at 349.

employees" but which the union subsequently refuses to ratify. *Hertz Corp.*, 304 NLRB 469 fn. 4 (1991); *Santa Rosa Hospital,* 272 NLRB 1004, 1006 (1984) ("the agreement reached on 9 March was subject to the express condition of employee ratification; thus, no 'agreement' sufficient to give rise to the Respondent's legal obligation to execute a written contract could exist prior to such employee ratification").

However, the policy concerns with maintaining a union's independence and status as the statutory representative have led the Board to take care not to hobble a union's ratification prerogatives in the absence of a true agreement with an employer regarding ratification. Precisely because "employee ratification marginally diminishes the statutory rights that Congress has bestowed on unions as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of its internal affairs . . . it is entirely fitting that the Board insist on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives." *Beatrice/Hunt-Wesson, Inc.,* 302 NLRB 224, 226 (1991) (Chairman Stephens concurring). Thus, the Board distinguishes between a union's expressions of intent to seek employee ratification, which the union can modify or ignore at will, and an actual bilateral agreement with an employer to make ratification a condition precedent to the formation of a binding contract. Only in the latter instance does the employer have cause to complain about a union's decision, contrary to its

agreement, to eschew the ratification process. And a bilateral agreement making ratification a condition precedent for contract formation is not established casually or equivocally. For instance, a union's repeated statements that it will take an agreement to its membership for ratification does not establish a bilateral enforceable agreement to do so, even if it creates an understanding between the parties that the union intends to undertake ratification of the agreements.[9] In order for the Board to find that

---

[9] *Personal Optics*, 342 NLRB 958, 962 (2004) ("Even if the Union's prior statements arguably may have led the Respondent to believe that the Union would conduct a vote of the bargaining unit, there was never any such agreement between the parties. Accordingly, we agree with the judge that the Union's acceptance of the Respondent's final offer created a binding collective-bargaining agreement"), enfd. 165 Fed. Appx. 1 (D.C. Cir. 2005); *Consumat Systems,* 273 NLRB 410, 413 (1984) ("Although the Union clearly stated that ratification by its membership was necessary for it to make a final and binding agreement, no agreement was made by the parties that made ratification necessary and no requirement that this occur was incorporated into the written contract proposal prepared by Respondent"); *Seneca Environmental Products,* 243 NLRB 624, 628-629, 631 (1979) (management's understanding that contract would be submitted to ratification, based on union's instructions that it would seek approval of the employees of any provisions negotiated, was not tantamount to an agreement that ratification was necessary precondition to execution of contract otherwise agreed upon), enfd. 646 F.2d 1170 (6th Cir. 1981); *C & W Lektra Bat Co.*, supra (stated intention to take any contract reached to the membership for approval does not constitute an agreement to make ratification a condition precedent to a collective-bargaining agreement, and cautioning, "We are unwilling to distort words of intention into terms of agreement, particularly where the subject is unrelated to wages and terms and conditions of

(Continued on following page)

ratification is a condition precedent to an enforceable agreement, the agreement by the parties to do so must be express.[10] Absent an express agreement between the parties to this effect, employee ratification

---

employment"); *Houchens Market of Elizabethtown,* 155 NLRB at 735.

[10] *Valley Central Emergency Veterinary Hospital,* supra at 1126, 1132 (condition precedent of employee ratification must be express and not created by union negotiator stating at first bargaining session that "both sides would take any agreement back for ratification" and by union telling mediator that union would recommend employee ratification if employer agreed to union security clause (which it later did)); *West Co.,* 333 NLRB 1314, 1320 (2001) ("there was no explicit agreement regarding ratification and the situation is unlike *Beatrice/Hunt-Wesson, Hertz,* and *Santa Rosa*"); *Auciello Iron Works, Inc.,* 303 NLRB 562, 565 (1991) ("The Board has consistently held that where there was no evidence of an explicit agreement between the negotiating parties about union ratification, the formality of such a vote by the union membership is not required as the foundation of a binding collective-bargaining agreement"), enfd. denied on other grounds 980 F.2d 804 (1st Cir. 1992); *Hertz Corp.,* supra (finding "express oral bilateral agreement to submit the parties' negotiated contract to a ratification vote"); *Zayre Department Stores,* 289 NLRB 1183 (1988) (no condition precedent of employee ratification based on employer's announcement at final bargaining session that it is "prepared to sign the agreement subject to acceptance or ratification by the employees" and at conclusion of this session union "said the contract isn't acceptable to us, but we will take it to a vote"); *Seneca Environmental Products,* supra at 628-629, 631 ("ratification, to be a condition precedent to a collective-bargaining agreement, must be agreed upon in express words and not merely implied"); *Martin J. Barry & Co.,* supra; C & *W Lektra Bat Co.*, supra at 1039 ("There is no evidence that the parties agreed in express words to such a condition (of contract ratification)").

is not a condition precedent for the formation of a binding collective-bargaining agreement, and the union retains sole discretion over whether to ratify the contract or not.

In this case, the General Counsel takes the position that the Union agreed to take the contract back for ratification, and did so pursuant to its own interpretation and application of its procedures for handling the approval of contracts. In this case that means that for members to reject a proposed contract, they had not only to vote against the contract by a majority but had to back up that vote with a supermajority vote in favor of a strike. If they did not, the contract was accepted. That is the Union's established procedure for ratification and in the General Counsel's view, when the Union informed NPS at the outcome of its ratification process that "we have an agreement," NPS had an obligation to execute and adhere to the agreement.

The Employer, on the other hand, takes the position that the Union agreed to ratification and that meant that a majority of employees must vote yes for the contract to be in effect. The Union could not rely on its own ratification procedure to accept the contract because that procedure did not result in a majority of employees voting yes to accept the contract. The Union did not obtain that, therefore, there was no legally binding acceptance of the contract, and no duty to adhere to or execute a collective-bargaining agreement. Therefore, NPS's (conceded) repudiation of the agreement was lawful. Alternatively, if the

Union did not agree to ratification (as the Employer defines it), then there was no meeting of the minds, and no contract, because that is what the Employer intended.

Both parties argue from the premise that some agreement on ratification was bilaterally entered in to; they disagree on the scope and implications of that agreement. Accordingly, I will assume, without deciding, that this premise is correct. In truth, I have some doubts on this score, but need not reach the issue.[11]

---

[11] It is notable that not one word was uttered by either party to the other regarding ratification during approximately 20-25 bargaining sessions over the course of 11 months, until *after* the union accepted (and signed off) on the Respondent's complete proposal for a new collective-bargaining agreement. The prior written references to ratification were inadequate to create a binding agreement on ratification. As to two of them – the one in the 18-page July 2007 letter summarizing bargaining, and the one attached to NPS's opening bargaining proposals on October 2006 – they were simply NPS proposals and there is no evidence they were accepted. Neither is reflected in the final proposal accepted by the Union. The third reference to ratification is contained in the wage provision of the tentative contract but this reference, by its terms, does not establish ratification as a condition precedent for enactment of the overall agreement, as it applies only to wages, and even as to that, it is ambiguous as to whether ratification is required.

If agreement on ratification is to be found the focus must be on the verbal exchange between negotiators *after* the Union accepted the contract proposal, when NPS negotiator Oesterle declared that he would sign the contract after ratification. Even indulging the inference that this meant, and was understood as meaning, he would sign the agreement "*only* after ratification," the Union's response strikes me as less than adequate to

(Continued on following page)

constitute an acceptance that, by purporting to render ratification a condition precedent to the formation of an agreement, necessarily *annulled* the binding agreement reached just seconds before by the parties. Clearly, had the Union objected to NPS's insistence on delaying signing until after ratification, and demanded that the employer sign the agreement immediately, it would have been an unfair labor practice for NPS to refuse. But while the Union's failure to expressly refuse may alleviate any contention that the Respondent unlawfully conditioned execution of an agreement already accepted on the Union's acceptance of a nonmandatory condition, the failure to expressly object does not convert the Union's preexisting intention to seek ratification of the contract – pursuant to its procedures – into an express agreement that ratification was now a condition precedent for the reaching of a binding agreement. A "meeting of the minds" is determined "not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776 fn. 2 (1989). In this case, what the parties said to each other seems inadequate to constitute an express bilateral agreement to ratify. See *C & W Lektra Bat Co.*, supra (cautioning with respect to claims of a ratification agreement: "We are unwilling to distort words of intention into terms of agreement, particularly where the subject is unrelated to wages and terms and conditions of employment"). The Union was already intending to commit the matter to its internal processes regardless of whether or not the employer mentioned ratification. For that reason alone there was no reason for it to object to NPS's untimely demand for ratification. Given that, it is hard to see that the Union's response to the Respondent's sudden demand – "we would like to vote the contract today" – indicates an agreement to add a condition precedent of ratification, in a very real sense undoing the binding agreement already reached between the parties. Under the circumstances, the Union's response to the employer's refusal to sign the agreement can most reasonably be understood as simply a determination to continue on the ratification path it was planning to pursue anyway; unilaterally seeking ratification as a prelude to requiring Employer performance under the agreement. The union "agreed" only in that sense.

(Continued on following page)

Even assuming that the parties entered into a bilateral agreement at the conclusion of the last bargaining session to make "ratification" a condition precedent to the Union's acceptance of the contract, the outcome in this case is clear.

The Employer does not have standing to challenge the method or mechanics of the Union's ratification process because it did not bargain for an agreement on the methods or mechanics of the ratification process. As the Board recently explained with regard to employee ratification, "even if such ratification were a condition precedent, Board law is clear that the Respondent does not have standing to challenge the Union's ratification process." *Valley Central Emergency Veterinary Hospital,* supra at 1127. Precisely because the "method of contract ratification was within the Union's exclusive domain and

---

Notably, the Board has refused to find ratification a condition precedent for contract formation in strikingly similar circumstances. See *Zayre Department Stores,* 289 NLRB 1183 (1988).

Perhaps the strongest point for Respondent is that union negotiator Chaszar agreed on cross-examination that when the Union accepted NPS's proposal he was "accepting the Company's notion that it would have to be ratified." Chaszar also answered "yes" when asked if there was any language in the contract that required it to be ratified. And he also was willing to agree on cross-examination that he agreed to have the contract ratified. I note only that in the context of the entire record, and in particular in context of what the record demonstrates objectively transpired at the bargaining table and what is objectively contained in the written proposals and documents, Chaszar's testimony finds little to no objective support.

control" an employer's refusal to honor a contract based on objections to the ratification process is unlawful.[12]

This is not to say that an employer, such as NPS, which has entered into an agreement making ratification a precondition to contract formation, is without standing to object (and refuse to sign the contract) if the union fails to undertake any ratification process. See, e.g., *Hertz Corp.*, 304 NLRB 469 (1991) (union

---

[12] Id. (summarizing and quoting from *Childers Products Co.*, 276 NLRB 709, 711 (1985), review denied mem. 791 F.2d 915 (3d Cir. 1986)); *Newtown Corp.*, 280 NLRB 350, 351 (1986) ("even if ratification were a precondition, we find that Respondent has no standing to question the validity of the procedures used by the Union in ratifying the agreement. It is well settled that ratification is an internal union matter which is not subject to question by an employer. Here, there was a meeting at which a vote was taken, and the Union concluded that the meeting and vote met its standards for a valid ratification vote. . . . Respondent may not raise questions concerning the Union's internal procedures in order to avoid its obligation to sign the agreed-upon contract") (quoting *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979), enfd. 819 F.2d 677 (6th Cir. 1987)). "Whether the ratification process is fair and proper, is not relevant to the question of the existence of an agreement. What is relevant is what the union tells the employer about ratification. . . . '[W]henever a labor organization gives notice to an employer that their agreement has been ratified by the employees, that notice signifies acceptance of the rights and duties arising under that agreement and, in turn, the statutory obligation arises to execute a written contract embodying that agreement.'" *Teamsters Local 589 (Jennings Distribution Inc.)*, 349 NLRB 124, 129 (2007) (fn. omitted) (quoting *Teamsters Local 662 (W. S. Darley & Co.)*, 339 NLRB 893, 899 (2003), enfd. 368 F.3d 741 (7th Cir. 2004)).

repudiated ratification agreement with employer and engaged in no ratification process, and therefore employer's refusal to execute agreement was not a violation of the Act). But an employer's right to take issue with a union's compliance with a bilateral agreement to ratify is limited to those instances where a union has reneged and not undergone a ratification procedure. The employer does not have standing to object to the ratification procedures chosen by the union where the employer has not bargained for an agreement regarding the procedures to be utilized.

In this case, assuming an agreement between the parties to ratify, there was no agreement, or even discussion, on the voting methods or process which the Union was required to undertake. The Employer could have tried to bargain for any or all manner of ratification requirements and procedures. It did not. In the absence of any negotiated agreement on how the Union would ratify the agreement, the Union was left with the discretion to carry out the ratification as it saw fit. That is, in effect, the default position for Federal labor policy, and it is altered only to the extent the Union has expressly bargained away its right to structure its internal relationship with employees and the right to conduct ratification in accord with its discretion as the employees' representative. Unions choose to approve and sanction contracts in a myriad of ways unobjectionable to Federal law and policy. The IAM's process, whatever the arguments in its favor or against it, is not a unique, dubious, or

legally controversial process.[13] The IAM's process is obviously designed to avoid rejection of tentative

---

[13] Union practices run the gamut, but procedures substantially similar to those utilized by the Union in this case can be found at other unions and other IAM lodges. See, e.g., *Paperworkers (International Paper)*, 295 NLRB 995, 1001-1002 (1989) ("A collective bargaining agreement must be ratified and approved by a majority of the members covered by said agreement present and voting on the question by secret ballot before the same shall be executed on behalf of the union . . . should a vote for ratification of a contract fail to yield a majority vote as required for acceptance by this Constitution and then fail to yield the two-thirds (2/3) majority vote necessary for strike sanction, the local or multiple so affected shall be considered to have accepted the labor agreement"); *Zayre Department Stores*, 289 NLRB 1183, 1185 (1988) ("In the event of rejection of the employer's proposal judged by the Local Union President or negotiating committee to be the employer's final proposal for a collective bargaining contract or renewal of an existing contract and the failure of the affected membership of the Local Union to approve a strike or other economic action by a two-thirds vote, the Local Union Executive Board shall, after notifying the International President and receiving acknowledgment of such notice, have authority to accept or reject such offer"); *Childers Products Co.*, 276 NLRB 709, 710 (1985) ("A bargaining committee made up of bargaining unit employees and union representatives negotiate with the employer for an agreement. When, in the committee's estimation, the best agreement has been reached, the bargaining unit members of the committee are instructed to go back to the other employees, inform them that an agreement has been reached and that a meeting will take place at a certain place and time and when the contract will be presented to them. A meeting is held, the Union reads the contract to the bargaining unit employees and they vote on it. If a majority of the employees vote to ratify the contract it is approved and the employer is instructed to put the agreement into effect. To authorize a strike, the employees must vote the contract down by two-thirds of those present and voting. If two

(Continued on following page)

agreements where the membership is unwilling to support a strike in numbers strong enough to give the Union the bargaining power the Union believes it needs to change the employer's position. It *is* an employee ratification process, involves employees voting twice, and it does give employees as a group the opportunity to decide whether to accept the contract. But it is a process designed by the Union to meet the tactical and strategic concerns of the union. There is no evidence that the Union utilized a ratification process designed to thwart, escape from, or defeat the agreement reached with the Employer. Rather, it utilized its longstanding ratification process, which did not violate any aspect of its ratification agreement with NPS. There was no discussion between the parties, much less agreement, on whether the ratification would consist of a vote of all employees, or just union members; whether tabulation would be based on those voting, or on the bargaining unit as a

---

thirds of the employees do not vote to strike, and a majority of the employees do not vote to accept the contract, the contract is presented to the executive board, which then votes on whether or not to accept or reject it. If, in the executive board's opinion, the contract is the employer's final offer, the executive board is obligated to accept the offer. A strike vote may be taken separately or may be accomplished in the vote on whether or not to accept the contract"); *United Technologies Corp.*, 274 NLRB 609, 610 (1985) (other IAM lodge: "At that meeting the Union presented only the 2-year option to the membership. The employees voted against accepting the 2-year option. However, as provided by the Union's bylaws, since a two-thirds majority did not authorize a strike, the Respondent's 2-year offer was automatically accepted").

whole, or union members. There was no discussion, much less agreement, on whether "ratification" would involve one straight up or down vote by those at the meeting or whether the contract would be accepted or rejected based just on that vote. The fact is there is *no* evidence that the Union and Employer discussed or agreed on any particular form of ratification, "let alone by a majority or even a representative employee group. . . . Thus, if there were any agreement on the part of the Union with respect to employee ratification, it could have extended no further than an undertaking on its part to comply with its internal union procedures and requirements relating to ratification." *North Country Motors Ltd.*, 146 NLRB 671, 673 (1964); *Beatrice/Hunt-Wesson,* supra at 224 fn.1 (distinguishing *Childers,* supra, where "unlike here [in *Beatrice/Hunt-Wesson*] the parties "never established during negotiations what the union meant by 'ratification' . . . [t]herefore, the method of ratification was left for the union to determine").

As explained by Judge Nations in *Childers,* supra at 711, in reasoning adopted by the Board and controlling here:

> In this proceeding, though the contract stated that it was "Subject to ratification," there was no requirement that employees of the Employer ratify the contract. The condition precedent of "ratification" means as defined by the Union in its internal procedures. There was no understanding established by the parties during negotiations concerning

> what the Union meant by ratification. I find, therefore, that the method of ratification was within the Union's exclusive control and domain and that the Union reasonably interpreted its constitution and bylaws concerning ratification and acted in accordance with them. . . .
>
> A union does not automatically assume the obligation of obtaining ratification of a contract negotiated on behalf of employees. If it does, however, 'it is for the Union, not the employer to construe and apply its internal regulations relating to what would be sufficient to amount to ratification. Although I found in the preceding section of this decision that the Union has properly interpreted and followed its internal procedures, and has thus ratified the contract in question, I further find that Respondent has no standing to question the procedure and that the method of contract ratification was within the Union's exclusive domain and control. Thus, by ignoring the Union's [ ] instruction to put the contract into effect and conditioning acceptance the contract on employee ratification, Respondent has violated Sections 8(a)(1) and (5) and (d) of the Act.

See also *West Co.*, 333 NLRB 1314, 1315 fn. 6, and 1320 (2001) ("we agree with the judge, for the reasons set forth by him, that it is for the Union to construe and apply its internal regulations relating to what would be sufficient to amount to ratification"; ALJ ruling: "even if the offer had been preconditioned

upon ratification, it would be inappropriate to permit litigation of the Union's adherence to its internal procedures in conducting the vote. The Respondent has no standing to question the validity of the procedures used by the union in ratifying the agreement").

NPS's position is that once it is conceded that the parties agreed to "ratification," the employer is graced with standing to argue whether that ratification meets standards the employer finds reasonable, desirable, or advantageous, but for which the employer failed to expressly bargain. I think this is a key error. The Federal labor policy disfavoring employer interference in the relationship between employees and their collective-bargaining representatives does not evaporate by virtue of an agreement between the employer and union that there will be "ratification" of a contract. A union entering into such an agreement is bound to engage in a ratification process to render the contract effective – hit cannot eschew ratification entirely, as the union did in *Hertz Corp.*, supra – but the union still maintains control over that process unless the process it utilizes runs afoul of an express agreement between the employer and union. A contrary holding would eviscerate Federal labor policy's concern with union independence and lead, as it does in this case, to the spectacle of an employer that bargained for "ratification" scouring union documents and literature (R. Br. at 10-12, 25-26) for statements that support its claim that the union did not comply with its own procedures or carried out ratification in a manner that does not meet standards the employer

would impose. Such contentions, and indeed, the Employer's entire argument, reveal the thorough interference with internal union matters to which the NPS position inexorably leads. Federal labor policy foresees the problem and Board precedent has dealt with it. Whether cast as an issue "involving the voluntary waiver of a union's statutory rights – the evidence of which [must] be clear and unmistakable,"[14] or simply as a way of preserving union autonomy in internal affairs and discouraging employer interference in the union-employee relationship,[15] the right of the employer to challenge and dictate ratification procedure is strictly confined to the procedures conceded by the union to the employer through agreement.

This point may be seen in operation in the Board cases on which NPS relies the most. Thus, in *Hertz Corp.*, the union, after agreeing to ratification held none – no vote or process at all. Similarly, in *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991), allegations similar to those at issue here were dismissed against an employer. In that case, the Board relied upon a memorandum of agreement executed by the parties to find that the employer and union explicitly agreed as a condition precedent that the tentative contract would be recommended to "the members of the bargaining unit for ratification as soon as possible." 302

---

[14] *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB at 226 (Chairman Stephens concurring) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983)).

[15] *Borg-Warner Corp.*, supra.

NLRB 224 fn. 1, and 228 fn. 3. After the bargaining unit employees repeatedly rejected the proposed contract, "the Union obtained what it considered to be adequate ratification from a vote of the union members, which actually consisted of just one individual." 302 NLRB at 224. (Chairman Stephens concurring). The point of *Beatrice/Hunt Wesson* – both the majority and concurrence – was that the union and employer negotiated for a specific set of employees – the members of the bargaining unit and not just union members – to ratify, and the union abandoned that negotiated requirement. The Board in *Beatrice/Hunt-Wesson,* distinguished *Childers,* supra, where, although the agreement stated "THIS AGREEMENT SUBJECT TO RATIFICATION," the parties did not discuss the meaning of the ratification language:

> "[T]he employer and union in *Childers* never established during negotiations what the union meant by 'ratification,' nor did they even discuss ratification during their negotiations. Therefore, the method of ratification was left for the union to determine. In contrast, the Respondent and Union here agreed that ratification by bargaining unit members was a precondition to the contract and discussed the ratification process. Thus, ratification was clearly defined and not left to the Union's internal procedures.

In his concurrence in *Beatrice/Hunt-Wesson,* Chairman Stephens made this point separately, approvingly citing a General Counsel Advice memorandum,

Nichols Nomeshield, Case 18-CA-8439 (1983) (available on Lexis at 1983 NLRB GCM Lexis 78), where

> The employer and the union had initially reached agreement on all terms and conditions of employment, subject to ratification. However, the employer then proposed, and the union acquiesced in, a revision that called for participation by both union members and nonmembers in the ratification vote. *The General Counsel noted that because nothing at first was said as to who would participate in the vote, the issue normally would be an internal matter that the union could resolve unilaterally.* But the General Counsel then concluded that the evidence of a subsequent agreement on full employee participation was clear enough, and the employer could refuse to execute as long as ratification was not conducted in accordance with the parties' agreement.

Beatrice/Hunt-Wesson, supra at 226 fn. 14 (emphasis added). Thus, Chairman Stephens endorsed the view that an undefined agreement to ratify leaves to the union the unilateral discretion on the methods and procedures of that ratification. That discretion is narrowed only and to the extent that the parties agree to specific rules or procedures for that ratification. In this case, the parties' agreement did not prescribe the ratification procedures, and NPS has no

standing to challenge the methods utilized by the Union.[16]

The Employer offers two further closely related arguments. NPS contends that the agreement to "ratify" *is* an agreement to use the ratification procedure preferred by Respondent: namely an up or down vote by the bargaining unit employees on whether a majority (presumably a majority of those voting, and

---

[16] NPS also argues vigorously that a General Counsel internal Advice memorandum, *Machinists Lodge 1746 (United Technologies Corp.)*, Case 39-CB-761 (December 20, 1985) (available on Lexis at 1985 NLRB GCM LEXIS 90), supports its position. It does not, and not just because Advice memoranda do not constitute Board precedent. *Kysor Industrial Corp.*, 307 NLRB 598, 602 fn. 4 (1992), enfd. w/o op. 9 F.3d 108 (6th Cir. 1993). In *Machinists Lodge 1746,* the General Counsel's Division of Advice counseled against prosecuting an IAM local, which utilized the same ratification process at issue here, but then refused to sign the agreement after the employees did not vote to accept the contract and did not vote to strike. This, the employer contended: was at odds with the union's longtime practice and, the employer argued, the IAM should be required to execute the contract in accordance with its longstanding ratification process. The General Counsel's Division of Advice recommended dismissal, precisely because "it does not appear that the parties ever expressly agreed that a vote by members to reject an offer but not to strike automatically created a contract." In truth, the case is more inapposite than contradictory of Respondent's position, since in *Machinists Lodge 1746,* there was no condition precedent which the union was bound to undertake before accepting the contract. But more generally, the case affirms the extent of union discretion in carrying out and implementing ratification procedures in the absence of an express agreement between the parties as to the precise methods and procedures required.

not a majority of those in the unit, although this is not clear) support or reject the contract. NPS contends that "'[r]atify,' when used in the field of labor relations has a generally prevailing meaning of a vote in favor by a majority of bargaining unit members" and that "the Union had every reason to know that this was the meaning the Employer attached to it" (R. Br. at 23). Under this view, NPS has standing to challenge the Union, for it is only enforcing the agreement it reached with the Union on ratification.

However, there is no basis for Respondent's view that an agreement to ratify *must* mean, or *must* be interpreted to mean, ratification as envisioned by the Respondent. It is not that NPS's preferred ratification process is unreasonable. It is just not self-evident, and, indeed, it is contrary to the way the IAM and other unions proceed. The word "ratification" itself means to "approve and sanction" (Webster's Third New International Dictionary (1986)) and, as noted, supra, unions choose to approve and sanction contracts in a myriad of ways. As discussed, the IAM's procedure is a ratification procedure, involving multiple votes by employees, weighted toward acceptance of the contract unless a supermajority is willing to strike in support of a better proposal. NPS cannot impose its model of ratification on the Union by claims that the Union should have known what it meant.

Finally, as a corollary of its argument, NPS contends that since it claims it intended ratification to

mean an up or down vote by employees, if the Union did not, there was no "meeting of the minds" and, therefore, no contract. This is entirely unpersuasive. First, for the reasons discussed, supra, I do not credit the claims of Hartz, for which no objective support exists, that throughout negotiations, his unexpressed understanding of the Employer's intent was that it was proposing the particular form of ratification it now seeks to impose as a condition precedent to contract formation. However, even if that were his (and Oesterle's) unexpressed view, as referenced above, a "meeting of the minds" is determined "not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776 fn. 2 (1989). Or, as the Board has recently explained, "[t]he expression 'meeting of the minds' is based on the objective terms of the contract, not on the parties' subjective understanding of those terms." *Winward Teachers Assn.*, 346 NLRB 1148, 1150 (2006). The expression is a misnomer to the extent it is used to suggest that for there to be a contract that "both parties have an identical understanding of the agreed-upon terms." Id. "Where the parties have agreed on the contract's actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract." Id. As the Board has repeatedly explained, the "subjective understandings or misunderstandings as to the meaning of terms which have been agreed to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard." *Diplomat Envelope Corp.*,

263 NLRB 525, 536 (1982), enfd. 760 F.2d 253 (2d Cir. 1985).

The Board's recent decision in *Winward Teachers Assn.*, supra, is instructive. In that case, the parties negotiated language stating that "[t]he School has the right to pay bonuses without Union approval." Subsequently, the union refused to execute the contract, contending that this language did not adequately describe its understanding, which included the additional requirement that the bonuses the school had a right to pay be disbursed in a manner that was "fair and equitable and across the board." The Board rejected the union's contentions, holding that "[w]here the parties have agreed on the contract's actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract." 346 NLRB at 1150.

Similarly, in the instant case, assuming an agreement to "ratify" or for "ratification" of the contract involving voting, nothing more than that was stated or written, much less agreed. That the Union and NPS have different ways of carrying out a ratification is without consequence for the issue of whether an agreement was reached. Assuming there was an agreement to make "ratification" a condition precedent, it is binding, and the Employer may not rely

on varying subjective understandings of what "ratification" should entail to void the agreement.[17]

The Respondent and the General Counsel contend that NPS and the Union bargained for "ratification." They got it. That it does not match what the Employer wishes it had bargained, or hoped it would get, is of no consequence to its obligation to execute and adhere to the collective-bargaining agreement reached with the employees' designated representative.[18]

---

[17] The instant case offers an instructive contrast with the ALJ's decision in *Teamsters Local 926* (*Penske Truck*), Case 6-CB-11383 (September 4, 2007) (available on the NLRB website), cited by NPS. There, the General Counsel failed to show a meeting of the minds between the parties on a key issue in negotiations – the staffing of a newly created position – which had been discussed, but as to which there had been neither oral agreement nor any language in the written agreement pertaining to the issue. It was not that the parties held subjectively different views on the meaning of an oral or written agreement on the issue, rather, there was nothing agreed to on the key issue. That is decisively different than the NPS's claim here, where it insists that the parties agreed to ratification, but then claims no meeting of the minds because the parties had different subjective views on the best way to conduct a ratification.

[18] Throughout its brief and at trial, NPS suggested that its stance on ratification was a product of its concern with employee rights, and an awareness of the potential for decertification of the union as the employees' representative. As the United States Supreme Court has warned, in the context of an employer seeking to withdraw recognition from a union based on its perception of the employees' lack of support for the union: "[t]he Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their

(Continued on following page)

CONCLUSIONS OF LAW

1. Respondent New Process Steel, LP is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since August 25, 2006, the Union has been the certified exclusive collective-bargaining representative of a bargaining unit of Respondent's employees composed of

---

certified union." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). In this case, as in *C & W Lektra Bat Co.*, supra, the employer's motive for its commitment to a version of ratification that the union cannot meet is obvious, if not directly relevant to the 8(a)(5) issue at stake. As the Board recognized in *C & W Lektra Bat Co.*:

> "The facts Respondent knew of the Union's membership problems; had received a petition by the employees to oust the Union; had heard 'rumbles' about employee dissatisfaction . . . and knew the Union's certification year expired [soon], all tend to suggest that Respondent was more interested in getting rid of the Union than in obtaining any legitimate benefit for itself in having the contract ratified and, indeed that insistence on ratification . . . was intended toward this end." 209 NLRB at 1039.

Here, as in *C & W Lektra Bat Co.*, the employer's interest in removing the union is not directly at issue, but serves as a rejoinder to the concern for employee rights with which it vests its position.

> All full-time and part-time production and maintenance employees employed by Respondent at its Butler, Indiana facility, but excluding all office clerical employees, professional employees, sales representatives, managerial employees, team leaders, guards, supervisors as defined by the Act, and all other employees.

4. Respondent and the Union entered into a collective-bargaining agreement effective by its terms August 12, 2007.

5. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to adhere to and repudiating its collective-bargaining agreement with the Union.

6. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must, upon request of the Union, adhere to the collective-bargaining agreement reached with the Union, restoring and giving effect to its terms retroactive to August, 12, 2007, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union,

Respondent must bargain upon request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement.

Respondent shall make whole its employees for losses in earnings and other benefits which they may have suffered as a result of Respondent's repudiation of and refusal to adhere to the collective-bargaining agreement, to be calculated in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Interest on all sums shall be computed as prescribed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[19]

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 25 for the Board what action it will take with respect to this decision. In the event that, during the

---

[19] The remedy and recommended Order shall not include direction to Respondent to reimburse the Union for dues lost on account of Respondent's failure and refusal to honor the collective-bargaining agreement, as the agreement contains neither a dues-checkoff provision nor any requirements related to union membership.

pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 11, 2007.

Respondent shall, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

---

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, New Process Steel, LP, Butler, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating and refusing to adhere to the collective-bargaining agreement reached with the Union and effective by its terms August 12, 2007.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Upon request of the Union, adhere to the collective-bargaining agreement reached with the Union, restoring and giving effect to its terms retroactive to August, 12, 2007, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, bargain upon request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement.

(b) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings

and other benefits suffered as a result of Respondent's repudiation of and refusal to adhere to the collective-bargaining agreement reached with the Union and effective by its terms August 12, 2007.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available at a reasonable place designated by the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Butler, Indiana, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered

---

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since September 11, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provisions of this Order.

Dated, Washington, D.C. May 1, 2008

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU
THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT repudiate or refuse to adhere to the collective-bargaining agreement reached with the Union and effective August 12, 2007.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL, upon request by the Union, adhere to the collective-bargaining agreement reached with the Union and effective August 12, 2007, giving effect to its terms retroactive to August, 12, 2007, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, we will, upon request, bargain with the Union and embody any understanding reached in a signed agreement.

WE WILL make all affected employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our repudiation of and refusal

to adhere to the collective-bargaining agreement reached with the Union and effective August 12, 2007.

NEW PROCESS STEEL, LP

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

New Process Steel, LP[1] ***and*** **District Lodge 34, International Association of Machinists and Eerospace** [sic] **Workers, AFL-CIO.** Case 25-CA-30632

September 30, 2008
DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

This case is before the Board[2] on cross-motions for summary judgment. The General Counsel seeks

---

[1] In several of the General Counsel's submissions to the Board, including its Motion for Summary Judgment, the Respondent is identified as New Process Steel of Indiana, Inc. The Respondent's correct name, as reflected in the caption above, is New Process Steel, LP.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

summary judgment on the ground that the Respondent, New Process Steel, LP, admittedly withdrew recognition from the Union on September 12, 2007, in violation of Section 8(a)(5) and (1), because such withdrawal was barred by a binding collective-bargaining agreement. The Respondent seeks summary judgment on the ground that it lawfully withdrew recognition from the Union, pursuant to a petition signed by a majority of unit members, because the parties never reached a final binding agreement. Thus, the outcome of this case depends on whether the collective-bargaining agreement at issue was a binding contract. For the following reasons, we find that the Respondent violated the Act by its withdrawal of recognition.

Upon a charge filed by the Union on March 10, 2008, the General Counsel issued a complaint on May 29, 2008, against the Respondent alleging that it violated Section 8(a)(5) and (1) of the Act. The Respondent filed an answer to the complaint on June 6, 2008, admitting that it withdrew recognition from the Union but denying that the parties reached a binding collective-bargaining agreement.[3]

---

[3] The Respondent also alleged in its answer that the Union violated Sec. 8(b)(3) by refusing to bargain in good faith. The Respondent did not pursue this claim in its cross-motion for summary judgment or in its opposition to the General Counsel's motion. We therefore find that the Respondent has abandoned this claim. We also note the General Counsel's assertion, which the Respondent does not dispute, that the Regional Director

(Continued on following page)

On July 10, 2008, the General Counsel filed a Motion for Summary Judgment with the Board. On July 15, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 29, 2008, the Respondent filed a Cross-Motion for Summary Judgment and Opposition to the General Counsel's Motion for Summary Judgment, and on August 8, 2008, the General Counsel filed an Opposition to the Respondent's Cross-Motion.

Ruling on the Motion and Cross-Motion for Summary Judgment[4]

In *New Process Steel, LP*, 353 NLRB No. 13 (2008), the Board found that the Respondent and the Union reached a binding collective-bargaining agreement, effective August 12, 2007, and that the Respondent unlawfully repudiated that agreement on September 11, 2007. The Respondent admits that it withdrew recognition from the Union on September 12, 2007, an act barred by the parties' binding contract. Accordingly, we grant the General Counsel's Motion for Summary Judgment, and we find, as a matter of law, that the Respondent unlawfully withdrew recognition from the Union on September 12,

---

dismissed the Respondent's Sec. 8(b)(3) charge and the dismissal was upheld on appeal.

[4] Both parties agree that there are no substantial and material issues of fact warranting a hearing.

2007, in violation of Section 8(a)(5) and (1). We also deny the Respondent's Cross-Motion for Summary Judgment.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the Respondent admits, and we find that at all material times New Process Steel, LP, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, the Respondent admits, and we find that the Union at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Contract Case

The Union was certified as the exclusive bargaining representative for a unit of the Respondent's employees on August 25, 2006. On August 9, 2007, after 11 months of contract negotiations, the Union accepted and signed the entire proposed agreement. The Respondent, however, stated that it would not sign the agreement until it was ratified. On August 12, 2007, the Union ratified the contract according to its established internal procedures.[5] The Union then

---

[5] According to its established procedures, the Union presents the contract to unit employees, who vote for or against the

(Continued on following page)

informed the Respondent that the agreement was accepted, and the Respondent signed it.

In the following weeks, the Respondent learned that the contract was not accepted by a majority vote of unit members. On September 11, 2007, the Respondent informed the Union by letter that because a majority of bargaining unit members voted against the agreement, it was never ratified, and thus the parties never reached a binding contract. The Respondent therefore refused to recognize or honor the contract's provisions.

The Union filed an unfair labor practice charge alleging that the Respondent unlawfully repudiated the contract. We adopted the judge's findings that the Respondent did not have standing to dispute the Union's ratification procedures, the parties reached a binding agreement, and thus the Respondent violated Section 8(a)(5) and (1) by repudiating that agreement.[6]

---

contract by secret ballot. If a majority of unit members votes in favor of the contract, it is ratified. If a majority votes against the contract, the Union conducts a secret-ballot strike vote. If the strike vote does not carry by a $^2/_3$ majority, the contract is deemed accepted. Here, a majority of unit members voted against the contract, but they failed to carry the strike vote by a $^2/_3$ majority. Thus, the contract was accepted.

[6] See *New Process Steel*, supra.

B. Withdrawal of Recognition

On September 12, 2007, the day after the Respondent repudiated the collective-bargaining agreement, the Respondent informed the Union that it had received a petition signed by a majority of bargaining unit members disavowing their support for the Union, and thus it was withdrawing recognition from the Union.[7] It has long been settled that contracts of definite duration for terms up to 3 years will bar an election for their entire period. See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). Moreover, the Supreme Court has confirmed that, under Board precedent, a union is entitled to a conclusive presumption of majority status during the term of any collective-bargaining agreement up to 3 years. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). Thus, the Respondent unlawfully withdrew recognition from the Union during the term of a binding contract.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of the employees in the unit, and has thereby engaged in unfair labor practices affecting commerce within the meaning of

[7] The validity of the employees' petition is not in dispute.

Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices by withdrawing recognition from the Union, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, New Process Steel, LP, Butler, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition during the term of a collective-bargaining agreement with District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following unit:

> All full-time and part-time production and maintenance employees employed by Respondent at its Butler, Indiana facility, but excluding all office clerical employees, professional

employees, sales representatives, managerial employees, team leaders, guards, supervisors as defined by the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit set forth above.

(b) Within 14 days after service by the Region, post at its facility in Butler, Indiana, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

---

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following unit:

> All full-time and part-time production and maintenance employees employed by us at our Butler, Indiana facility, but excluding all office clerical employees, professional employees, sales representatives, managerial employees, team leaders, guards, supervisors as defined by the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the above unit.

NEW PROCESS STEEL, LP

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 4, 2008 Decided May 1, 2009

No. 08-1162

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 08-1214

On Petition for Review
and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

Charles P. Roberts, III, argued the cause for petitioner. With him on the briefs was *Clifford H. Nelson, Jr.*

James B. Coppess argued on the cause for intervenor. With him on the brief was *James D. Fagan, Jr.*

Ruth E. Burdick, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were *Julie Broido*, Supervisory Attorney, and *Jacob Frisch*, Attorney. *Ronald Meisburg*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *John H. Ferguson*, Associate General

Counsel, and *Linda Dreeben*, Deputy Associate General Counsel also entered an appearance.

Before: SENTELLE, *Chief Judge*, TATEL, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

SENTELLE, *Chief Judge*: Laurel Baye Healthcare of Lake Lanier, Inc. petitions for review of an order of the National Labor Relations Board finding that Laurel Baye engaged in unlawful labor practices, and imposing a remedy. The Board cross-petitions for enforcement of the order. Unlike the typical petition for review of an NLRB order, Laurel Baye does not advance allegations of error in the Board's findings, conclusions, or remedies, but rather challenges the authority of the Board to enter the order at all, as the Board had only two members and therefore did not meet the statutory Board quorum requirement of three members. The Board argues that because the Board itself had earlier delegated all of its authority to a three-member panel of which the two remaining Board members constituted a quorum, that quorum of the delegee panel had the authority to enter the order. Because we agree with Laurel Baye that the Board's purported order was beyond its lawful authority, we rule that the purported order is without force, deny the Board's cross-petition for enforcement, and remand the matter for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum.

I. BACKGROUND

A. Legal Background

The National Labor Relations Act (NLRA), now codified as 29 U.S.C. §§ 151-169 (2008), originally provided that the National Labor Relations Board (Board) would consist of three members. *See* Act of July 5, 1935, ch. 372, § 3(a), 49 Stat. 449, 451 (amended 1947). As subsequently amended and at all times relevant to the current proceeding, the NLRA provides that "the Board shall consist of five instead of three members." 29 U.S.C. § 153(a). Section 3(b) of the NLRA states, in relevant part, that:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b).

This section encompasses four provisions. First, the delegation provision states that "[t]he Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." *Id.* Second, the vacancy provision provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the

powers of the Board." *Id.* Third, the Board quorum provision states that "three members of the Board shall, at all times, constitute a quorum of the Board." *Id.* Finally, the delegee group quorum provision states that "two members shall constitute a quorum of any [three-member] group [to which the Board delegated its powers pursuant to the delegation provision.]" *Id.*

B. Factual Background

This case arises out of unfair labor practice charges brought in 2005 by Intervenor, United Food and Commercial Workers Union Local 1996 (United), and the General Counsel of the Board against Petitioner Laurel Baye Healthcare of Lake Lanier, Inc. (Laurel Baye). On July 12, 2006, after a hearing, an administrative law judge issued a proposed decision and order concluding that Laurel Baye had committed violations of sections 8(a)(1) and (a)(5) of the NLRA. Laurel Baye filed with the Board exceptions to the ALJ's decision, which the Board accepted on September 7, 2006.

Between the time that the ALJ issued his decision and the time that the Board took up review of Laurel Baye's exceptions to the decision the previously-five-member Board underwent a series of dramatic personnel changes. On December 16, 2007, Board Chairman Robert J. Battista's term expired, leaving four members on the Board. On December 20, 2007, the remaining four members of the Board (Wilma Liebman, Peter Schaumber, Peter Kirsanow, and

Dennis Walsh) unanimously voted to delegate all of its powers to a three-member group consisting of Board members Liebman, Schaumber and Kirsanow, effective December 28, 2007.

The purpose of this delegation of power was simple and transparent. According to the Board's minutes on that day, this action was done in anticipation "that in the near future [the Board] may for a temporary period have fewer than three Members," because the recess appointment terms for Members Walsh and Kirsanow were set to expire on December 31, 2007. The Board was of the view that "this action will permit the remaining two Members to issue decisions and orders in unfair labor practice and representation cases after [the] departure of Members Kirsanow and Walsh, because the remaining Members [Liebman and Schaumber] will constitute a quorum of the three-member group [under section 3(b) of the NLRA]." In addition to its own interpretation of the statutory text, the Board relied on the legal analysis set forth in a March 4, 2003 Memorandum Opinion issued by the Office of Legal Counsel of the U.S. Department of Justice. In its Memorandum Opinion, OLC concluded, as did the Board, that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." Quorum Requirements, 2003 WL 24166831 (Mar. 4, 2003).

On December 31, 2007, the recess appointments of Members Walsh and Kirsanow expired. Since

January 1, 2008, the Board has functioned with the two remaining members, Liebman and Schaumber, who acted as a two-member quorum of the three-member delegee group created by the Board's December 20, 2007, action. On February 29, 2008, Members Liebman and Schaumber issued a Decision and Order adopting the ALJ's rulings, findings and conclusions, and adopting the ALJ's recommended Order in full (with only inadvertent errors corrected). This Decision and Order was issued under the two members' authority as a two-person quorum of the three-member group designated by the Board. Kirsanow, by that time no longer a member of the Board, did not take part in hearing or resolving this case at all.

Laurel Baye petitions this Court for review of the Board's decision. In so doing, "Laurel Baye does not challenge the merits of the Board's unfair labor practice findings or its remedy." Rather, Laurel Baye contends that the two members of the Board lacked the power to issue a Decision and Order in this case. The Board cross-petitions for enforcement of its unfair labor practice order.

II. ANALYSIS

This case concerns the interplay of the delegation, vacancy, and quorum provisions of section 3(b) of the NLRA, and requires us to determine whether, under these provisions, the two-member delegee group consisting of Members Liebman and Schaumber could lawfully issue an order finding that Laurel

Baye engaged in unfair labor practices. Laurel Baye challenges both the legitimacy and continuing nature of the Board's delegation. The Board counters that its actions give effect to every provision within section 3(b). Specifically, the Board posits that there is a general quorum requirement of three members, except where powers have been delegated to a group of three, in which case the two-member delegee group quorum provision and the vacancy provision allow the remaining two members of the Board to continue to act as a delegee group.

Laurel Baye argues for the invalidity of the Board's action under two rationales. First, it contends that the Board has no authority to delegate its power to a three-member group that it knows will be acting as a two-member group due to expected term expiration. In Laurel Baye's view, the Board's delegation cannot stand because it is simply a sham. The second formulation of Laurel Baye's argument is that even if the Board could make the initial delegation, that delegation cannot survive the loss of a quorum on the Board itself. Because we find the second formulation of the argument convincing, we pretermit the first.

"A cardinal principle of interpretation requires us to construe a statute 'so that no provision is rendered inoperative or superfluous, void or insignificant.'" *Asiana Airlines v. FAA,* 134 F.3d 393, 398 (D.C. Cir. 1998) (quoting *C.F. Commc'ns Corp. v. FCC,* 128 F.3d 735, 739 (D.C. Cir. 1997)). The Board's interpretation of section 3(b), however, violates this principle of statutory interpretation by eschewing various portions of

the statutory language. Specifically, the Board's position ignores the requirement that the Board quorum requirement must be satisfied "*at all times.*" 29 U.S.C. § 153(b) (emphasis added). Moreover, it ignores the fact that the Board and delegee group quorum requirements are not mutually exclusive. The delegee group quorum provision's language does not eliminate the requirement that a quorum of the *Board* is three members. Rather, it states only that the quorum of any three-member *delegee group* shall be two. *Id.* The use of the word "except" is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value. *See id.* The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members. Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, "at all times," satisfied. *Id.* But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.

Indeed, if Congress intended a two-member Board to be able to act as if it had a quorum, the existing statutory language would be an unlikely way to express that intention. The quorum provision clearly requires that a quorum of the Board is, "at all times," three members. 29 U.S.C. § 153(b). A

modifying phrase as unambiguous as this denotes that there is no instance in which this Board quorum requirement may be disregarded. Contrary to the Board's contentions, Congress did not intend to use the delegee group quorum provision as an exception to the requirement that the Board quorum requirement must be met "at all times." Though the delegee group quorum provision is preceded by the prepositional phrase "except that," *id.*, Congress's use of differing object nouns within the two quorum provisions indicates clearly that each quorum provision is independent from the other. The establishment of a two-member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole. In fact, it does not seem odd at all that a sub-unit of any body would have a smaller quorum number than the quorum of the body as a whole. Quorums, after all, are usually majorities. A majority of three is smaller than a majority of five. It therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum "at all times" would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization. Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met at all times. The delegee group quorum provision does not eliminate this requirement.

The strained interpretation by the Board is contrary to basic tenets of agency and corporation law. As the Restatement (Third) of Agency sets forth, an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended. Restatement (Third) of Agency § 3.07(4) (2006). An agent's delegated authority is also deemed to cease upon the resignation or termination of the delegating authority. 2 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 504 (2008); *see Emerson v. Fisher,* 246 F. 642, 648 (1st Cir. 1918) (holding that a corporate treasurer's resignation terminated any authority delegated by the treasurer to other individuals). Moreover, as Fletcher notes, a delegating board of directors's powers are suspended whenever the board's membership falls below a quorum. *See* 2 Fletcher Cyclopedia of the Law of Corporations § 421 ("If there are fewer than the minimum number of directors required by statute, [the remaining directors] cannot act as a board."). In the context of a board-like entity, a delegee's authority therefore ceases the moment that vacancies or disqualifications on the board reduce the board's membership below a quorum. It must be remembered that the delegee committee does not act on its own behalf. The statute confers no authority on such a body; it only permits its creation. The only authority by which the committee can act is that of the Board. If the Board has no authority, it follows that the committee has none. The delegee's authority to act on behalf of the Board therefore

ceased the moment the Board's membership dropped below its quorum requirement of three members.

We reach this conclusion despite the Board's contention that this court has permitted other agencies to continue to function with fewer than a majority of their membership positions filled. Specifically, the Board cites to two cases from this court: *Railroad Yardmasters of America v. Harris,* 721 F.2d 1332 (D.C. Cir. 1983), and *Falcon Trading Group, Ltd. v. SEC,* 102 F.3d 579 (D.C. Cir. 1996).

In *Yardmasters,* we held that the two sitting members of the National Mediation Board (NMB) could properly delegate the NMB's powers to one of the members, despite the fact that one of the two delegating members resigned later that day, thereby leaving a single NMB member to conduct the NMB's business. *Yardmasters,* 721 F.2d at 1342-45. The Board argues that our reasoning in *Yardmasters* enables the Board to take action to continue to operate. In *Yardmasters,* we noted that if the NMB "can use its authority to delegate in order to operate more efficiently, then *a fortiori* the Board can use its authority in order to continue to operate when it otherwise would be disabled." *Id.* at 1340 n.26. Similarly, the Board argues that allowing the Board to act to preserve its continuity would give effect to the language and purpose of the NLRA. After all, the Board contends, the inclusion of the delegation provision was designed to ensure that the Board was able to operate more efficiently. Moreover, the NLRA was designed to prevent "industrial strife." 29 U.S.C. § 151. As a

result, the argument goes, the NLRB's reliance on a combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies was consistent with the purpose of the NLRA, and was therefore proper.

We are unmoved. Our reasoning in *Yardmasters* does not apply to this case. In that case, we went to great lengths to note the "narrowness of our holding." *Yardmasters*, 721 F.2d at 1344. We expressly noted that our holding governed only whether the NMB was able to delegate its authority to a single NMB member. *See id.* at 1344-45. Further, we stressed that the holding was not meant to extend to agencies such as the NLRB, in light of the fact that the NLRB was "principally engaged in substantive adjudications [concerning] unfair labor practices [and] enforc[ing] individual rights. . . ." *Id.* at 1345. We conclude that *Yardmasters'* reasoning is limited to its statutory context. Therefore, the principle set forth in *Yardmasters* that an agency board's delegation of power is "not affected by changes in personnel" due to it being "[i]nstitutional" in nature does not apply here. *Id.* at 1343. In response to the dissent's concerns that the court's validation of the NMB's delegation could lead to abuse of power, the *Yardmasters* court specifically stressed the fact that the NMB's functions were entirely unlike the functions of the National Labor Relations Board, which "adjudicate[s] unfair labor practices [and] seek[s] to enforce individual rights under the Act." *Yardmasters,* 721 F.2d at 1345. We emphasized that "the [NMB's] role is perhaps best

illustrated by its critical duty . . . of notifying the President that a labor dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service.'" *Id.* (quoting 45 U.S.C. § 160 (1976)). Our reliance on this distinction as a basis for our holding in *Yardmasters* strongly suggests – if not expressly states – that *Yardmasters'* holding was not intended to apply in cases involving the adjudication of unfair labor practices, such as the case before us now.

Likewise, *Falcon Trading* offers no support to the Board. In that case, we approved the SEC's promulgation of a new quorum rule, which stated that the SEC's quorum would equal the number of remaining commissioners if the number of remaining commissioners fell below the normal three-commissioner quorum; we also upheld an SEC opinion issued by a two-member Commission acting pursuant to this quorum provision. *Falcon Trading,* 102 F.3d at 582. We held that, "[*i*]*f not otherwise constrained by statute,* an agency *sufficiently empowered by its enabling legislation* may create its own quorum rule." *Id.* (emphasis added). We approved the SEC's power to determine how many members constituted a quorum because Congress "specifically bestowed [that power] on the Commission." *Id.* Further, we noted that the SEC's quorum determination was lawful because it was "not countermanded elsewhere by Congress, as for example in an explicit statutory quorum provision." *Id.*

This highlights the fundamental problem with the Board's reasoning. The Securities Exchange Commission was sufficiently empowered by its enabling legislation; the Board is not. Indeed, Congress has spelled out precise quorum provisions for the Board. Congress provided that a quorum of the Board is three members. The Board does not have three members. It cannot act. Though section 3(b) gives the Board power to delegate its authority to a group of members, this authority is necessarily limited by the fact that the delegation authority allows the Board to grant its power only to a group of three or more members. *See* 29 U.S.C. § 153(b). The Board's delegation power is also obviously limited by the fact that the Board quorum provision establishes that the power of the Board to act exists when the Board consists of three members. *Id.* The delegee group's delegated power to act, however, ceases when the Board's membership dips below the Board quorum of three members. *See supra* at pp. 7-9. It therefore follows that where, as here, a delegee group acts on behalf of the Board, *see id.*, the Board quorum requirement still must be satisfied.

Further, the Board's interpretation is not supported by the text of the vacancy provision. The vacancy provision states only that "[*a*] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." 29 U.S.C. § 153(b) (emphasis added). One reading of this text would suggest the Board's ability to act is impaired if there is more than one vacancy on the

Board. The Board quorum provision, however, clarifies that "three members of the Board shall, at all times, constitute a quorum of the Board." *Id.* A quorum is defined as "[t]he minimum number of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business." Black's Law Dictionary 1284 (8th ed. 2004). The Board's ability to legally transact business exists only when three or more members are on the Board. Considering the language of the vacancy and Board quorum provisions in tandem, it is clear that the vacancy provision allows the Board to function fully with at most two vacancies. This is the maximum number of vacancies that the Board can sustain and still maintain a quorum. This is consistent with the delegation provision's requirement that the Board may delegate its authority only to groups of three or more members. 29 U.S.C. § 153(b).

After oral argument, the Board called our attention to a new decision, *Northeastern Land Services, Ltd. v. NLRB,* No. 08-1878, 2009 WL 638248 (1st Cir. Mar. 13, 2009). The Board asserts that the First Circuit decided the same issue as the one before us and decided it in favor of the Board. We note that the First Circuit decided the case in terms of the continuing validity of a three-member delegee group after the expiration of the term of one member. The determination of that issue is not necessary to our decision, given that we have determined that the lack of a quorum on the Board as a whole is the determining factor. Concededly, the Board prevailed before

the First Circuit on facts parallel to those before us. But the First Circuit did not decide the same issue. In any event, the First Circuit's decisions are not binding precedent upon us. We are bound only by the decisions of our circuit and the Supreme Court. This is in keeping with the Supreme Court's recognition that each court of appeals has a duty to resolve the rules independently of each other. *See United States v. Mendoza,* 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." (citing *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 135 n.26 (1977))).

III. CONCLUSION

Finally, we acknowledge that the case before us presents a close question, and that neither OLC's interpretation nor the Board's desire to continue to function is entirely indefensible. Both were undoubtedly born of a desire to avoid the inconvenient result of having the Board's adjudicatory wheels grind to a halt. Nevertheless, we may not convolute a statutory scheme to avoid an inconvenient result. Our function as a court is to interpret the statutory scheme as it exists, not as we wish it to be. Any change to the statutory structure must come from the Congress, not the courts. U.S. Const. art. I, § 1. Perhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision

by ratifying or otherwise reinstating the rump panel's previous decisions, including the case before us. *See, e.g., FEC v. LegiTech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) (affirming properly reconstituted FEC Board's ratification remedy for its unconstitutional membership).

In the meantime, however, because we determine that the Board was not properly constituted and it did not have the authority to issue the order before us, we grant the petition of Laurel Baye Healthcare and order that the decision of the NLRB be vacated, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum. We also deny the Board's cross-petition for enforcement of its invalid order.

So ordered.

OPPOSITION BRIEF

No. 08-1457

In the Supreme Court of the United States

NEW PROCESS STEEL, L.P., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

RUTH E. BURDICK
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Argument 8
Conclusion 18

TABLE OF AUTHORITIES

Cases:

American Directional Boring, Inc., 353 N.L.R.B. No. 21 (Sept. 30, 2008), petition for review pending, No. 09-1194 (8th Cir. filed Jan. 26, 2009) 15

Bentonite Performance Minerals, LLC, 353 N.L.R.B. No. 75 (Dec. 31, 2008), petition for review pending, No. 09-60034 (5th Cir. filed Jan. 21, 2009) 16

Eagle Ray Elec. Co. & IBEW, Local No. 1, 354 N.L.R.B. No. 27 (May 29, 2009), petition for review pending, No. 09-1164 (D.C. Cir. filed June 12, 2009) .. 15

Extendicare Homes, Inc., 354 N.L.R.B. 905 (2005) 17

Garner v. *Teamsters, Local Union No. 776*, 346 U.S. 485 (1953) 2

Hartford Head Start Agency, Inc., 354 N.L.R.B. No. 15 (Apr. 30, 2009), application for enforcement pending, No. 09-1741 (6th Cir. filed June 8, 2009) 16

Laborers Int'l Union of N. Am. Local 578, 352 N.L.R.B. 1005 (2008) 16

Laborers' Int'l Union, Local No. 169, 352 N.L.R.B. 33 (2008), petition for review No. 08-71053 (9th Cir. filed June 23, 2009) 16

Cases—Continued: Page

Laurel Baye Healthcare of Lake Lanier, Inc. v. *NLRB*, 564 F.3d 469 (D.C. Cir. 2009) 4, 10, 11, 14, 15, 16

Local 17B, Graphic Commc'ns Conference, Int'l Bhd. of Teamsters, 353 N.L.R.B. No. 4 (Sept. 12, 2008) 16

Local 155, Int'l Union, United Auto Workers, 352 N.L.R.B. 1122 (2008) 16

NLRB v. *Fansteel Mettallurgical Corp.*, 306 U.S. 240 (1939) 2

Northeastern Land Servs. Ltd. v. *NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009) 8, 11, 14

Photo-Sonics, Inc. v. *NLRB*, 678 F.2d 121 (9th Cir. 1982) 14

Republic of Iraq v. *Beaty*, 129 S. Ct. 2183 (2009) 13

Saigon Gourmet Rest., Inc., 353 N.L.R.B. No. 110 (Mar. 9, 2009) 15

SFO Good-Nite Inn, LLC, 352 N.L.R.B. 42 (2008), petition for review pending, No. 08-1148 (D.C. Cir. filed Apr. 4, 2008) 16

Snell Island SNF LLC v. *NLRB*:

352 N.L.R.B. No. 106 (July 18, 2008), enforced, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009) 15

568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009) 14

Wayneview Care Ctr. & Victoria Health Care Ctr., 352 N.L.R.B. 1089 (2008), petition for review pending, No. 08-1307 (D.C. Cir. filed Sept. 19, 2008) 16

Case—Continued: Page

United Food & Commercial Workers Union, Local 4, 353 N.L.R.B. No. 47 (Oct. 31, 2008), petition for review pending, No. 09-70922 (9th Cir. filed Mar. 30, 2009) 16

Statutes:

Higher Education Opportunity Act, Pub. L. No. 110-315, § 497, 122 Stat. 3328 (to be codified at 20 U.S.C. 1099c-1(b)(8) (Supp. II 2008)) 12

Labor Relations Management Act, 1947, ch. 120, § 101, 61 Stat. 139 3

National Labor Relations Act, ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*) 3

29 U.S.C. 151 ..... 2, 15

29 U.S.C. 153 2

29 U.S.C. 153(a) (§ 3(a)) 3

29 U.S.C. 153(b) (§ 3(b), 49 Stat. 451) ..... *passim*

29 U.S.C. 153(d) (§ 3(d)) 4

29 U.S.C. 154 2

29 U.S.C. 158 2

29 U.S.C. 158(a)(1) (§ 8(a)(1)) 6

29 U.S.C. 158(a)(5) (§ 8(a)(5)) 6

29 U.S.C. 159 2

29 U.S.C. 160 2

29 U.S.C. 160(e) (§ 10(e)) 4

29 U.S.C. 160(f) (§ 10(f)) 4, 15, 16

29 U.S.C. 160(j) (§ 10(j)) 4

4 U.S.C. 6 12

Statutes—Continued: Page

20 U.S.C. 1099c-1(b)(8) 12
42 U.S.C. 4954 12

Miscellaneous:

BNA:
166 *Daily Labor Rep.* A-1 (Aug. 29, 2005) 17
83 *Daily Labor Rep.*, AA-1 (May 4, 2009) 5
Black's Law Dictionary (9th ed. 2009) 12
Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (2000) 16
155 Cong. Rec. S7332 (daily ed. July 9, 2009) 5
36 Fed. Reg. 12,967 (1971) 12
Minute of Board Action (Dec. 20, 2007) 4
National Labor Relations Board:
Press Release, *Labor Board Temporarily Delegates Litigation Authority to General Counsel: Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007) 4
Second Annual Report (1937) 3
Sixth Annual Report (1942) 3
Seventh Annual Report (1943) 3
Thirteenth Annual Report (1949) 3

Miscellaneous—Continued: Page

1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 100th Cong., 2d Sess. (1988) 3

Office of Legal Counsel, Department of Justice, *Quorum Requirements*, 2003 WL 24166831 (Mar. 4, 2003) 4

S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 15

Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Report Labor-Management Relations* Pt. 3 (Comm. Print 1948) 3

John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 Lab. Law. J. 1 (2000) 17

Webster's Third New International Dictionary (1961) 10

In the Supreme Court of the United States

No. 08-1457

NEW PROCESS STEEL, L.P., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 564 F.3d 840. The decisions and orders of the National Labor Relations Board (Pet. App. 26a-81a) are reported at 353 NLRB Nos. 13 and 25.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. The petition for writ of certiorari was filed on May 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(b) of the National Labor Relations Act provides in relevant part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. * * * A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. 153(b).

STATEMENT

1. In enacting the National Labor Relations Act (NLRA), Congress sought through "the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-258 (1939); see 29 U.S.C. 151. To that end, the NLRA provides mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress "confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal," the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 489-490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted, the Board comprised three members, and the vacancy and quorum provisions of the Act provided: "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum."

National Labor Relations Act, ch. 372, § 3(b), 49 Stat. 449, 451.[1]

In 1947, Congress enacted the "Taft-Hartley Act," which enlarged the Board's unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board's size from three to five members. See Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," and amended the quorum requirements to provide that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation]." *Ibid.* Since 1947, the overwhelming majority of the Board's decisions have been issued by three-member groups constituted pursuant to the Board's Section 3(b) delegation authority.[2]

---

[1] Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 23, 1936; August 27 until November 26, 1940; and August 28 until October 11, 1941. See *NLRB Second Annual Report* 7 (1937); *NLRB Sixth Annual Report* 7 n.1 (1942); *NLRB Seventh Annual Report* 8 n.1 (1943). Those two-member Boards issued 3 published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published decisions in 1940 (reported at 27 N.L.R.B. 1-1386 and 28 N.L.R.B. 1-79); and 224 published decisions in 1941 (reported at 35 N.L.R.B. 24-1334 and 36 N.L.R.B. 1-44).

[2] See *NLRB Thirteenth Annual Report* 8-9 (1949); Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Report on Labor-Management Relations* Pt. 3, at 9 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 100th

2. In 2002, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, Department of Justice, *Quorum Requirements*, 2003 WL 24166831 (Mar. 4, 2003). Prior to that request, the Board had not issued decisions when it had only two members. *Id.* at *1. The OLC opinion concluded that, under Section 3(b), if the Board, at a time when it had at least three members, had "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." *Ibid.*

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. On December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.[3] *Laurel Baye Healthcare of lake Lanier, Inc.*, 564 F.3d 469, 471 (D.C. Cir. 2009).

Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman's statement).

[3] Also on that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Section 10(e), (f) and (j) of the NLRA, 29 U.S.C. 160(e), (f) and (j). See Minute of Board Action (Dec. 20, 2007); NLRB Press Release, *Labor Board Temporarily Delegates Litigation Authority to General Counsel: Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007).

After the recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the Board had delegated to the three-member group.[4] Since January 1, 2008, that group, through its two-member quorum, has issued over 400 decisions.[5]

3. Petitioner New Process Steel operates four steel processing plants in the United States and one in Mexico. Pet. App. 2a. In September 2006, petitioner commenced negotiating a collective bargaining agreement with the International Association of Machinists and Aerospace Workers, AFL-CIO (Union), which was certified as the exclusive bargaining representative for employees at petitioner's plant in Butler, Indiana. *Id.* at 2a-3a. After extensive negotiations, representatives of petitioner and the Union reached a tentative agreement. *Id.* at 3a. The Union ratified the agreement according to its procedures, and petitioner's representatives then executed it. *Id.* at 5a-6a. But after petitioner subsequently received some employee complaints about the ratification procedure used for the agreement, petitioner withdrew its recognition of the Union. *Id.* at 6a.

The Union filed an unfair labor practices charge with the NLRB on September 17, 2007. Pet. App. 6a. In De-

---

[4] On July 9, 2009, the Senate received the President's nomination of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009).

[5] On May 4, 2009, it was reported that the two-member quorum of the group had issued approximately 400 decisions, published and unpublished. See BNA, 83 *Daily Labor Rep.* AA-1, at 1. The published decisions are reported in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), and 354 N.L.R.B. (82 decisions as of September 28, 2009).

cember 2007, the Board's General Counsel filed a complaint alleging that petitioner had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by wrongfully repudiating a valid collective-bargaining agreement. Pet. App. 6a-7a, 30a. After holding a hearing, an administrative law judge (ALJ) issued a decision in May 2008, finding that petitioner violated the Act as alleged. *Id.* at 7a, 26a. Later that month, the General Counsel issued a second complaint alleging that petitioner further violated its duty to bargain by withdrawing recognition of the Union during the term of a binding contract. *Id.* at 73a. The General Counsel filed with the Board a motion for summary judgment on the second complaint in July 2008, based on petitioner's admission that it had withdrawn recognition. *Id.* at 6a-7a.

The Board issued decisions resolving both complaints in September 2008. In the first decision, the Board adopted the ALJ's finding that petitioner violated the Act by repudiating the collective-bargaining agreement, and ordered petitioner to adhere to the contract, to restore and give retroactive effect to its terms, and to make the employees whole for their resulting losses. Pet. App. 26a-27a, 67a-69a. In its second decision, the Board granted the General Counsel's motion for summary judgment and ordered petitioner to cease and desist from its unlawful withdrawal of recognition during the term of the contract, and to recognize and bargain with the Union. *Id.* at 72a-80a.

4. Petitioner filed petitions for review of the Board's orders in the United States Court of Appeals for the Seventh Circuit. The Board cross-applied for enforcement of the orders, and the court of appeals consolidated the cases. Pet. App. 7a. Petitioner challenged the authority of the two-member quorum of the delegee group

to issue the decisions and orders and also disputed the substance of the Board's unfair labor practice findings. *Id.* at 17a-18a. The court of appeals granted the Board's cross-applications for enforcement and denied petitioner's petitions for review.

Petitioner argued that the delegation clause of Section 3(b) prohibited the Board from delegating its power to a group of three members when the Board knew that the term of one of the three was about to expire. The upshot of petitioner's view, the court noted, was that "the first sentence of § 3(b) restricts the Board from acting when its membership falls below three." Pet. App. 10a. The court rejected that position, concluding that the plain language of Section 3(b) provides that the Board may act where, as here, the Board "delegated its full powers to a group of three Board members" and two of those members remain as a quorum. *Ibid.* The court reasoned:

> As we read it, [Section] 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the [Board]'s delegation procedure.

Id. at 10a-11a (footnote omitted).

The court further explained that, contrary to petitioner's contention, that reading of Section 3(b) does not deprive its first sentence of meaning. "The first sentence," the court reasoned, "establishes a requirement

for delegation in the first instance, while the vacancy and quorum provisions allow the Board to proceed in the event that the terms of Board members subsequently expire." Pet. App. 10a n.2. By contrast, the court continued, petitioner's reading of Section 3(b) "appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two." *Ibid.*

The court of appeals also explained that its view of Section 3(b) was consistent with the legislative history of the Taft-Hartley Act, which contained no indication that Congress intended to prohibit the two-member quorum from acting in these circumstances, Pet. App. 13a-15a; with quorum principles applicable to public boards in other circumstances, *id* at 16a-17a; and with the First Circuit's decision upholding the authority of the two-member quorum in *Northeastern Land Services, Ltd.* v. *NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009), Pet. App. 11a-12a.

On the merits, the court of appeals rejected petitioner's challenges to the Board's findings of unfair labor practices. Pet. App. 17a-25a.

ARGUMENT

The court of appeals correctly held that Section 3(b) of the NLRA, 29 U.S.C. 153(b), allows the NLRB to continue to function when its only two sitting members constitute a two-member quorum of a three-member group to which the Board validly delegated its powers. The NLRB agrees with petitioner, however, that review by this Court is warranted because this case presents a recurring question of substantial importance regarding the authority of the Board to act and the validity of

many of its orders, and the courts of appeals are in conflict on that question.

1. The court of appeals correctly held that the plain language of Section 3(b) of the NLRA permits the NLRB to operate with only two sitting members when four members of the Board had previously delegated the Board's full authority to a three-member group that includes the two current members. As relevant to this case, Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate "any or all of the powers which it may itself exercise" to a group of three or more members; (2) a declaration that a vacancy in the Board "shall not impair" the authority of the remaining members to exercise the Board's powers; and (3) a provision stating that three members shall constitute a quorum of the Board, but with an express exception stating that two members shall constitute a quorum of any group designated pursuant to the Board's delegation authority.

When the then-four-member Board delegated all of its authority to a three-member group of the Board in December 2007, it did so pursuant to the first provision. When the term of one of those members (as well as that of the fourth sitting Board member) expired on December 31, 2007, the remaining two members constituted a quorum of the group to which the Board's powers had been lawfully delegated. Consistent with Section 3(b)'s second and third provisions identified above, those "two members" then continued to exercise the previously delegated powers, and their authority to do so was "not impair[ed]" by a vacancy in the other positions on the Board. 29 U.S.C. 153(b). The validity of the Board's actions thus follows from a straightforward reading of the Act.

Petitioner relies (Pet. 9-12) on the reasoning of the District of Columbia Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469 (2009) (*Laurel Baye*), which held that the two remaining Board members may not act on behalf of the Board.[6] The D.C. Circuit focused in *Laurel Baye* largely on the portion of Section 3(b) stating that "three members of the Board shall, at all times, constitute a quorum of the Board." As the court read that language, the three-member quorum requirement must be satisfied at all times in order for any portion of the Board to act, "regardless of whether the Board's authority is delegated to a group of its members." 564 F.3d at 472. That interpretation fails to give proper weight to the modifying phrase that directly follows: "except that two members shall constitute a quorum of any group designated pursuant to [the delegation clause]." 29 U.S.C. 153(b).

The ordinary meaning of the word "except" is "with the exclusion or exception of." *Webster's Third New International Dictionary* 791 (1961). Thus, the ordinary meaning of the quorum provisions in Section 3(b) is that the special two-member quorum rule for a group to which the Board has delegated powers is an exception to the general three-member quorum rule for the full Board. The full Board must have three or more participating members in order to take any action, including to delegate any of its powers to a group of three of its members. And that delegee group in turn must have at least two participating members in order to exercise any of the powers delegated to it. But where, as here, the Board previously delegated all of its powers to a three-

---

[6] The Board is filing a petition for a writ of certiorari in *Laurel Baye* simultaneously with the filing of its response in the instant case.

member group, any two members of that group constitute a quorum and may continue to exercise the delegated powers. The legality of such actions does not depend on whether the Board as a whole also has a quorum, because the Board has already delegated its full authority to the delegee group, which appropriately acts through a quorum of two members. See *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F.3d 36, 41 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009) (*Northeastern*).

Although the D.C. Circuit in *Laurel Baye* purported to apply the rule that a statute should be construed so that "no provision is rendered inoperative or superfluous, void or insignificant," 564 F.3d at 472, the court in fact treated the statute as though it did not contain the word "except." The court reasoned that "the word 'except' is * * * present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value" than the larger Board's ability to act. *Ibid.* But Congress could have accomplished that result by leaving out the word "except" altogether and instead setting forth two independent clauses or sentences, the first stating that "three members of the Board shall, at all times, constitute a quorum of the Board," and the second stating that "two members shall constitute a quorum of any group designated pursuant to [the delegation clause]." 29 U.S.C. 153(b). Rather than doing that, Congress linked the two clauses with a comma and word "except," which means that the special quorum rule in the second clause constitutes an exception to the general quorum rule in the first. Indeed, Congress has used the construction "at all times * * * except" in a number of statutes to accomplish exactly what it did here—to provide that a general rule should

apply at all times *except* in the instances specified in the statute. See, *e.g.*, Higher Education Opportunity Act, Pub. L. No. 110-315, § 497, 122 Stat. 3328, (to be codified at) 20 U.S.C. 1099c-1(b)(8) (Supp. II 2008) (Secretary of Education shall "maintain and preserve *at all times* the confidentiality of any program review report * * * *except* that the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review") (emphasis added).[7]

The D.C. Circuit in *Laurel Baye* also failed to give the word "quorum" its ordinary meaning, which is "[t]he minimum number of members (usu[ally] a majority of all the members) who must be present for a deliberative assembly to legally transact business." *Black's Law Dictionary* 1370 (9th ed. 2009). Section 3(b)'s establishment of two members as a quorum of a delegee group denotes that the group may legally transact business with two of its members. Under the reasoning of the *Laurel Baye* decision, however, the presence of a two-member quorum of a delegee group possessed of all the Board's powers is never in itself sufficient to permit the legal transaction of business by that group unless there also happens to be a third sitting Board member. That reading untethers the quorum requirement for the full Board from the purpose of a quorum provision—namely, to set the minimum *participation* level required before

---

[7] Accord 42 U.S.C. 4954 (a) (full-time commitment of VISTA volunteer "shall include a commitment to live among and at the economic level of the people served * * * *at all times* during their periods of service, *except* for authorized periods of leave") (emphasis added); 4 U.S.C. 6, historical note; Proclamation No. 4064, 36 Fed. Reg. 12,967 (1971), ("the flags of the United States displayed at the Washington Monument are to be flown *at all times* during the night and day, *except* when the weather is inclement") (emphasis added).

a body may take action. Under the D.C. Circuit's reading, the full Board quorum provision in Section 3(b) establishes a minimum *membership* level for the full Board that must be satisfied in order for a delegee group to act, even though the non-group members of the full Board would not participate in the delegee group's action.

Contrary to the D.C. Circuit's conclusion, however, when the full Board takes an action, that action—whether a regulation or an order or a delegation to a three-member group—acquires the force of law in its own right. There is no basis in Section 3(b) for concluding that such an action is deprived of its legal force and effect if the full Board thereafter loses its quorum. Cf. *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2194-2195 (2009) (noting that the "expiration of *authorities* * * * is not the same as cancellation of the *effect* of the President's prior valid exercise of those authorities"). Because the full Board validly delegated all of its powers to a three-member group when the Board had four members, any subsequent loss by the full Board of its quorum and ability to act did not abrogate the legal effect of the Board's prior completed act of delegation.

That conclusion is supported not only by the plain text of the Act, but also by the compelling public interest in the continuity of government operations and the enforcement of an Act that is central to promoting labor peace and the free flow of commerce.

2. Review by the Court is warranted because there is a circuit conflict on the question of the authority of the two-member quorum of the delegee group of the Board to act in these circumstances, and because the issue is important and recurring.

a. The decision below is in agreement with decisions of the First and Second Circuits. *Northeastern*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009); *Snell Island SNF, LLC* v. *NLRB*, 568 F.3d 410, 423 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009) (*Snell Island*). The First Circuit reasoned that, once the Board delegated its authority to the three-member group pursuant to Section 3(b), the subsequent "vacancy, which left the two-member quorum remaining, may not, under the terms of [S]ection 3(b), impair the right of the two-member quorum to exercise all powers of the Board." *Northeastern*, 560 F.3d at 41. The Second Circuit found that the language of Section 3(b) is ambiguous, but deferred to the Board's interpretation of Section 3(b) in holding that the two-member quorum of the delegee group could continue to exercise the powers of the Board. *Snell Island*, 568 F.3d at 420-424.[8]

The court of appeals' decision directly conflicts, however, with the D.C. Circuit's decision in *Laurel Baye*. As discussed above, the D.C. Circuit held that Section 3(b)'s Board quorum provision prohibits the Board or any delegee group of the Board from acting when the Board's overall membership falls below three, regardless of whether the delegee group has a quorum. The contrary decision in *Laurel Baye*, moreover, has a disproportionate effect on the Board's ability to fulfill its

---

[8] The decisions in *Northeastern*, *Snell Island*, and the instant case are also consistent with the Ninth Circuit's decision in *Photo-Sonics, Inc.* v. *NLRB*, 678 F.2d 121 (1982). Although the Ninth Circuit in that case did not have occasion to consider the question presented here, it held that two members of a three member group to which authority to decide a case had been delegated could issue a decision in that case after the resignation of the third member of the group. *Id.* at 122-123.

statutory obligations because Section 10(f) of the NLRA permits any "person aggrieved" by a Board order to challenge the order in the D.C. Circuit. 29 U.S.C. 160(f).

For that reason, simultaneously with the filing of this brief, the Solicitor General is filing a petition for a writ of certiorari in *Laurel Baye*, and suggesting that the Court hold that petition pending the Court's disposition of this case.

b. The question whether the remaining two-member quorum of the three-member group to which the Board delegated its powers may continue to exercise those powers is important and recurring. Congress charged the NLRB with the job of safeguarding the free flow of commerce by promptly resolving labor disputes. 29 U.S.C. 151; S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947) ("There is no field in which time is more important."). Since January 1, 2008, the two-member quorum of the Board's delegee group has issued hundreds of decisions resolving allegations of unfair labor practices and disputes over union representation, including cases involving employers' discharges of employees for exercising their organizational rights;[9] disputes over secret ballot elections to select a union representative;[10] employers' unlawful withdrawals of recognition of union

---

[9] See, *e.g.*, *American Directional Boring, Inc.*, 353 N.L.R.B. No. 21 (Sept. 30, 2008), petition for review pending, No. 09-1194 (8th Cir. filed Jan. 26, 2009); *Saigon Gourmet Restaurant, Inc.*, 353 N.L.R.B. No. 110 (Mar. 9, 2009).

[10] See, *e.g.*, *Snell Island SNF, LLC*, 352 N.L.R.B. No. 106 (July 18, 2008), enforced, 568 F.3d 410, 423 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); *Eagle Ray Elec. Co. & IBEW, Local No. 1*, 354 N.L.R.B. No. 27 (May 29, 2009), petition for review pending, No. 09-1164 (D.C. Cir. filed June 12, 2009).

representatives;[11] refusals by employers or unions to honor their obligation to bargain in good faith;[12] and requirements that employees pay union dues as a condition of employment.[13] If the disagreement among the courts of appeals is permitted to stand, the Board will be unable to redress such issues in many instances. In particular, as noted above, the D.C. Circuit's decision in *Laurel Baye* will have a disproportionate impact on the Board's ability to administer the NLRA throughout the country because Section 10(f) of the Act permits any "person aggrieved" by a Board order to challenge the order in the D.C. Circuit. 29 U.S.C. 160(f).

Although the Board in the past had declined to issue decisions when it had only two sitting members,[14] the

---

[11] See, *e.g.*, *Bentonite Performance Minerals, LLC*, 353 N.L.R.B. No. 75 (Dec. 31, 2008), petition for review pending, No. 09-66034 (5th Cir. filed Jan. 21, 2009); *SFO Good-Nite Inn, LLC*, 352 N.L.R.B. No. 42 (Mar. 20, 2008), petition for review pending, No. 08-1148 (D.C. Cir. filed Apr. 4, 2008).

[12] See, *e.g.*, *Wayneview Care Ctr. & Victoria Health Care Ctr.*, 352 N.L.R.B. 1089 (2008), petition for review pending, No. 08-1307 (D.C. Cir. filed Sept. 19, 2008); *Hartford Head Start Agency, Inc.*, 354 N.L.R.B. No. 15 (Apr. 30, 2009), application for enforcement pending, No. 09-1741 (6th Cir. filed June 8, 2009); *Local 17B, Graphic Commc'ns Conference, Int'l Bhd. of Teamsters*, 353 N.L.R.B. No. 4 (Sept. 12, 2008); *Local 155, Int'l Union, United Auto Workers*, 352 N.L.R.B. 1122 (2008); *Laborers' Int'l Union, Local No. 169*, 352 N.L.R.B. 33 (2008), petition for review pending, No. 08-71053 (9th Cir. filed Mar. 13, 2008).

[13] See *e.g.*, *United Food & Commercial Workers Union, Local 4*, 353 N.L.R.B. No. 47 (Oct. 31, 2008), petition for review pending, No. 09-70922 (9th Cir. filed Mar. 30, 2009); *Laborers Int'l Union of N. Am. Local 578*, 352 N.L.R.B. 1005 (2008), enforced, No. 08-71053, 2009 WL 1955815 (9th Cir. Jun. 23, 2009).

[14] See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1274 (2000) ("where the Board has fallen below

Board in 2002 sought the opinion of the Office of Legal Counsel on whether the Board had the authority to issue decisions when only two of its five positions were filled, if the two sitting members constituted a two-member quorum of a three-member delegee group. OLC concluded that the Board has that authority, and the Board relied on that opinion on December 28, 2007, when it delegated all of its powers to the three-member group that included the two current members.[15] Although the current period—now more than 20 months long—is the longest the Board has ever been with only two sitting members since Section 3(b) was amended in 1947, the Board has previously had only two members and may again in the future. Resolution of the question whether the Board may act with a two-member quorum of a three-member group is, therefore, important to the Board's future ability to enforce the NLRA—and vital to its current ability to do so.

---

three members, the Board has declined to rule on pending contested matters until a third member has been appointed"); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 Lab. Law. J. 1, 6 n.20 (2000) (noting the existence of an inactive two-member Board from November 26, 1993, through January 23, 1994, when no decisions were issued).

[15] The Board first relied on the OLC opinion on August 26, 2005, when the three sitting members delegated all of the Board's powers to themselves as a three-member group in anticipation of the expiration of Member Schaumber's term on August 27, 2005. See BNA, 166 *Daily Labor Rep.*, A-1 (Aug. 29, 2005). Between August 28 and August 31—when Member Schaumber was reappointed through a recess appointment—the two-member quorum issued a few unpublished orders and one published ruling on a procedural motion. See *Extendicare Homes, Inc.*, 345 N.L.R.B. 905 (2005). None of its rulings was challenged on the ground that the two remaining members did not have the authority to act.

For these reasons, and in light of the circuit conflict, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

RUTH E. BURDICK
Attorney
National Labor Relations Board

SEPTEMBER 2009

AMICUS CURIAE BRIEF

No. 08-1457

Supreme Court, U.S.
FILED
JUN 26 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MARSHALL B. BABSON
Counsel of Record
CHRISTINE M. FITZGERALD
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. ALLOWING THE SPLIT AMONG THE COURTS OF APPEALS TO REMAIN THREATENS THE STABILITY OF LABOR RELATIONS IN THE UNITED STATES	4
A. The Board's December 2007 Delegation of Power	4
B. Consistency With Regard to the Issue of Whether a Two-Member Board Can Issue Decisions is Essential	5
II. THE SEVENTH CIRCUIT DECISION MISINTERPRETS SECTION 3(b) OF THE NATIONAL LABOR RELATIONS ACT	6
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: PAGE

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 8-9

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 9

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) .....*passim*

Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009) 5, 6

New Process Steel, L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009) 5, 6

Snell Island SNF LLC v. NLRB, No. 08-3822-ag(L), 08-4336-ag(XAP), 2009 U.S. App. LEXIS 13008 (2d Cir. June 17, 2009) .....*passim*

Statutes:

28 U.S.C. § 2112(a)(3)..... 5

29 U.S.C. § 153(a)..... 4

29 U.S.C. § 153(b) .....*passim*

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents an underlying membership of over three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the litigants.

This case presents the question of whether the National Labor Relations Board (the "NLRB" or the "Board"), the independent federal agency charged with enforcing the National Labor Relations Act ("NLRA"), has authority to decide cases with only two sitting Members, where 29 U.S.C. § 153(b) explicitly provides that "three members of the Board

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

shall, at all times, constitute a quorum of the Board." This question is of significant concern to the Chamber as many of its members are employers subject to the NLRA.

The United States Courts of Appeals for the First, Second, Seventh and District of Columbia Circuits are split on this issue, with the First, Second and Seventh Circuits upholding the validity of two-member Board decisions and the D.C. Circuit finding that the NLRA requires three or more Board Members in order for the NLRB to act. The divide in the circuits calls into question the fundamental authority of the NLRB to act and the validity of the hundreds of decisions made by the Board since January 1, 2008, as well as any decisions it makes until a third Member is confirmed by the Senate. The authority of the NLRB is of the utmost importance to the businesses represented by the Chamber. The Chamber has a vital interest in ensuring that the United States labor law framework under which its members operate is rational, fair, and consistent, and that the agency responsible for enforcing the NLRA at all times is acting within its authority in fulfilling its obligations and responsibilities under the statute.

SUMMARY OF ARGUMENT

The fundamental authority of the NLRB, the agency in charge of administering the NLRA, remains compromised until the issue of the authority of a two-member Board to carry out all of the duties and responsibilities of the NLRB is resolved. The split among the circuits regarding the power of a two-member Board raises primary questions about the validity of several hundred decisions issued by

the two-member NLRB since January 1, 2008. A clear statement regarding the authority of the Board is necessary for the stability of labor relations throughout the United States. Barring intervention from this Court, the divide among the circuits will only proliferate, since additional cases presenting this precise issue are pending before courts in multiple circuits. Moreover, given the present political composition of the United States Senate, it is highly likely that at other times in the near future, the Board again may find itself with only two Members facing a question regarding their power to act. Accordingly, the likelihood is that this important question regarding the NLRB's authority to act will reoccur if it is not resolved.

As the largest representative of employers in the United States, the Chamber has a fundamental interest in ensuring the proper functioning of, and proper functioning by, the NLRB. The decision below misinterpreted section 3(b) of the NLRA by, *inter alia*, ignoring its explicit requirement that the Board must have three Members "at all times."

In view of the foregoing, the Court should grant the Petition for a Writ of Certiorari to the Seventh Circuit filed by New Process Steel.

ARGUMENT

I. ALLOWING THE SPLIT AMONG THE COURTS OF APPEALS TO REMAIN THREATENS THE STABILITY OF LABOR RELATIONS IN THE UNITED STATES

A. The Board's December 2007 Delegation of Power

The NLRB consists of five Members appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a). Section 3(b) of the NLRA provides that:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

On December 20, 2007, the Board, which then consisted of only four Members, two of whom had terms set to expire December 31, 2007, delegated its powers to three of its Members effective December 28, 2007. The Board intended the delegation of powers to permit the remaining two Members to issue decisions and orders as a quorum of the three-member group. Indeed, since January 1, 2008, the Board has issued hundreds of decisions as a two-member panel or group. Although President George W. Bush

attempted to fill the vacant NLRB seats in 2008, his efforts were thwarted by the Senate.

B. Consistency With Regard to the Issue of Whether a Two-Member Board Can Issue Decisions is Essential

The authority of the NLRB to issue decisions and orders is of primary importance to the administration of the NLRA. The Courts of Appeals are divided on whether the two-member NLRB resulting from the Board's December 2007 delegation of power has the power to act. As a result, employers in the First, Second and Seventh Circuits cannot be sure whether an order of the NLRB will be enforceable. If the employer challenges the Board's authority to issue a decision in the D.C. Circuit, the Board's order shall be voided in light of the Court's holding in *Laurel Baye Healthcare of Lake Lanier, Inc. v. National Labor Relations Board*, 564 F.3d 469 (D.C. Cir. 2009). If the Board or another interested party asks the First, Second or Seventh Circuits to enforce an order, however, regarding the authority of the Board to act, the order shall be binding. *See Snell Island SNF LLC v. NLRB*, Nos. 08-3822-ag(L), 08-4336-ag(XAP), 2009 U.S. App. LEXIS 13008 (2d Cir. June 17, 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009); *Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009). Where competing petitions for review of an agency decision are filed in multiple circuits within ten days of a Board decision, the enforceability of the Board's decision and the authority of a two-member Board to act shall be determined randomly in accordance with 28 U.S.C. § 2112(a)(3). Moreover, the divide among the circuits will only proliferate, as cases involving this very issue presently are pend-

ing before courts in several circuits. Without the intervention of this Court, the enforceability of each decision made by the NLRB until the Senate confirms one of President Obama's nominees may be in doubt.

The issue of the authority of a two-member Board also should be resolved by the Court at this time in view of the fact that it is likely to arise again. Given the increase in political partisanship, and the closely drawn numbers in the United States Senate, it is highly likely that a question regarding the power and authority of a two-member NLRB will continue to recur.

II. THE SEVENTH CIRCUIT DECISION MISINTERPRETS SECTION 3(b) OF THE NATIONAL LABOR RELATIONS ACT

In upholding the validity of two-member Board decisions, the Seventh Circuit held that the "plain meaning" of section 3(b) supported the Board's December 2007 delegation of power. In reaching this conclusion, the court relied upon the language of section 3(b) regarding the quorum of a group, and upon the First Circuit's decision in *Northeastern Land Services v. National Labor Relations Board*, which similarly found that "the Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)." *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 846 (7th Cir. 2009) (quoting *Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009)). Neither the Seventh Circuit below, or the First Circuit in *Northeastern Land Services*, however, discussed or reconciled the competing language in section 3(b)

that requires a three-member quorum of the full Board.

The decision below, and the First Circuit decision, simply ignore the plain and unambiguous language of section 3(b), which states that "three members of the Board shall, *at all times*, constitute a quorum", and thereby fail to give proper effect to section 3(b)'s separate quorum requirements. (emphasis supplied.) Indeed, in pursuit of a rationale that would allow the Board to continue to function with only two Members, the First and Seventh Circuits' decisions essentially re-write section 3(b) to provide a two-member quorum requirement for the Board. In contrast, the D.C. Circuit, on the very same day that the Seventh Circuit issued its decision, correctly held that section 3(b) provides that the NLRB may not function with less than three sitting Members.

In *Laurel Baye Healthcare of Lake Lanier, Inc. v. National Labor Relations Board*, 564 F.3d 469 (D.C. Cir. 2009), the D.C. Circuit interpreted section 3(b) as permitting the Board to act with two Members *only if* the Board maintains a quorum of three sitting Members at all times. Noting that section 3(b) unambiguously states that "three members of the Board shall, at all times, constitute a quorum", the Court observed that nothing that follows this statement qualifies the "Board quorum" requirement of three sitting Members. *Id.* at 472-73. The additional provision of section 3(b) that allows two Members of the Board to act on behalf of a "three-member group" to whom the Board has delegated authority does not permit a two-member quorum of a group to supplant a three-member quorum of the Board. *Id.* In this regard, the Court stated that:

> [i]t therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum "at all times" would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization. Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met at all times.

Id. at 473.

The D.C. Circuit correctly recognized that in the Taft-Hartley Act's 1947 amendments to the NLRA expanding the Board from three to five Members, Congress wanted to ensure in the NLRA that the Board was authorized to hear cases in three-member panels or groups, but that at all times, a quorum *of the Board* shall nevertheless be three Members. *Id.* at 470, 475. The two-member quorum of the group or panel is intended to *subserve* the Board's general three-member quorum requirement, *not supersede* it. As the D.C. Circuit recognized, it is a fundamental principle of agency law that when the delegating authority's power lapses, the delegation itself lapses. *Id.* at 473; *see also* 29 U.S.C. § 153(b) (". . . any or all of the powers which it may itself exercise . . .").

The Second Circuit took a somewhat different approach than the Seventh Circuit by applying a *Chevron* analysis. In *Snell Island SNF LLC v. National Labor Relations Board*, Nos. 08-3822-ag(L), 08-4336-ag(XAP), 2009 U.S. App. LEXIS 13008 (2d Cir. June 17, 2009), the Court applied the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

837 (1984), for reviewing an administrative agency's attempt to give meaning to the statute it administers. *Snell*, 2009 U.S. App. LEXIS 13008, at *27-41. After finding that the Congressional intent of the three-member Board quorum requirement in section 3(b) is unclear, the Second Circuit applied the second step of the *Chevron* analysis, which it believed required it to defer to the Board's interpretation of its own power to act with two Members under the NLRA. *Id.* at *38-41. This Court need not decide whether a *Chevron* analysis is appropriate where the agency is passing on its own power or authority to act, however, because the statute herein is clear on its face that a quorum of the Board at all times must be comprised of three Members.[2]

While, in the words of the Second Circuit, the NLRB should be commended "for its conscientious efforts to stay 'open for business' in the face of vacancies that it did not create and for which it lacked the authority to fill", *Snell*, 2009 U.S. App. LEXIS 13008, at *40, the Chamber agrees with the D.C. Circuit, which noted, "we may not convolute a statutory scheme to avoid an inconvenient result." *Laurel Baye*, 564 F.3d at 476.

---

[2] Moreover, even if the statute were not plain on its face, the NLRB's construction of the statute raises serious separation-of-powers concerns by permitting an independent regulatory agency to supplant the necessity of the President and the Senate to carry out their Article II responsibilities to nominate and confirm officials to constitute the requisite quorum. As such, the constitutional avoidance canon would require the construction advocated by the Petitioner. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MARSHALL B. BABSON
Counsel of Record
CHRISTINE M. FITZGERALD
HUGHES HUBBARD
& REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

PETITIONER'S BRIEF

149

No. 08-1457

Supreme Court, U.S.
FILED
DEC 23 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER NEW PROCESS STEEL, L.P.

MARK E. SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG, LLP
2101 L St., N.W., Ste. 1000
Washington, DC 20037
Tel: (202) 331-3100

SHELDON E. RICHIE
Counsel of Record
RICHIE & GUERINGER, P.C.
100 Congress Ave., Ste. 1750
Austin, TX 78701
Tel: (512) 236-9220

JOSEPH W. AMBASH
JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
Tel: (617) 310-6091

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

Rule 5 Savoy

QUESTION PRESENTED

Does the National Labor Relations Board have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board?"

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioner states that New Process Steel, L.P. is a Delaware limited partnership. The partners are New Process Steel GP LLC, an Illinois limited liability company, and Richard Fant, an individual. New Process Steel Holding Co., Inc., a Texas corporation, is a member of New Process Steel GP LLC. None of these entities is publicly traded. The National Labor Relations Board is a federal agency established by the National Labor Relations Act, 29 U.S.C. § 153.

New Process Steel, L.P. ("New Process") was the respondent before the National Labor Relations Board ("NLRB" or "Board") and the petitioner/cross-respondent in the court of appeals. New Process is the petitioner in this Court. The NLRB was the cross-respondent/petitioner in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
A. Background	3
B. Proceedings Below	7
SUMMARY OF ARGUMENT	13
ARGUMENT	16
I. THE PLAIN LANGUAGE OF THE NLRA DOES NOT AUTHORIZE A TWO-PERSON BOARD	16
A. Well-Established Principles of Statutory Construction Require that All Words and Phrases Be Given Effect	17
1. Common Sense and Common Law Principles Support the D.C. Circuit's Plain Language Construction	23
2. The Theories Adopted by the Other Circuits Cannot Be Reconciled with Each Other or the Words of the Statute	27

TABLE OF CONTENTS – Continued

Page

B. Other Agencies Have Abided By Their Quorum Constraints 28

C. The Actions of the NLRB Since 1947 Reinforce the Plain Meaning of the Statute 32

D. The Authority to Ensure the Board's Ability to Function Notwithstanding Vacancies Rests with the President or Congress, Not with the NLRB or the Courts 36

II. REQUIRING THREE MEMBERS AT ALL TIMES FOR THE NLRB TO ACT DOES NOT IMPOSE AN ADMINISTRATIVE BURDEN OR UNDERMINE NATIONAL LABOR POLICY 39

CONCLUSION 41

ADDENDUM

29 U.S.C. § 153 ..... 1a

Minute of Board Action, December 20, 2007 ..... 4a

TABLE OF AUTHORITIES

Page

CASES

Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998) 34

Assure Competitive Transp. v. United States, 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 429 U.S. 1124 (1981) 35

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) 24

Ballew v. Georgia, 435 U.S. 223 (1978) 35

Brighton Retail, Inc., 354 NLRB No. 62 (2009) 35

Engine Mfr. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 18

Essex Valley Visiting Nurses Ass'n, 352 NLRB 427 (2008) 36

Falcon Trading Group, Ltd. v. SEC, 102 F.3d 579 (D.C. Cir. 1996) 39

FTC v. Flotill Prods., Inc., 389 U.S. 179 (1967) 39

Gross v. FBL Fin. Servs., Inc., 129 S.Ct. 2343 (2009) 17

Hall-Brooke Hosp. v. NLRB, 645 F.2d 158 (2d Cir. 1981) 4

Hamilton Sundstrand, 352 NLRB 482 (2008) 35

Hibbs v. Winn, 542 U.S. 88 (2004) 18

I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 28

TABLE OF AUTHORITIES – Continued

Page

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 18

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) .....*passim*

Lorge School, 352 NLRB 119 (2008) 36

McLaughlin v. Union Oil Co. of California, 869 F.2d 1039 (7th Cir. 1989) 31

Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121 (1997) 12

Narricot Indus. L.P. v. NLRB, ___ F.3d ___, 2009 WL 4016113 (4th Cir., Nov. 20, 2009) ...12, 20, 27

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 24

Northeastern Land Servs. v. NLRB, 560 F.3d 36 (1st Cir. 2009) 9, 27

Photo-Sonics, Inc. v. NLRB, 678 F.2d 121 (9th Cir. 1982) 5, 9

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) 40

Secretary of Labor, Mine Safety and Health Admin. v. Cannelton Indus., 26 FMSHRC 146, 2004 WL 787220 (F.M.S.H.R.C. March 12, 2004) 31

Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009) 12, 28

Teamsters Local Union No. 523 v. NLRB, Nos. 08-9568 and 08-9577 (10th Cir., Dec. 22, 2009) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 40

United States v. Mead Corp., 533 U.S. 218 (2001) 28

United States v. Texas, 507 U.S. 529 (1993) 24

United States v. Turkette, 452 U.S. 576 (1981) 27

Wisconsin Bell, 346 NLRB 62 (2005) 22

CONSTITUTIONS

U.S. CONST., art. II, § 2 36

STATUTES AND REGULATIONS

2 U.S.C. § 437c 25, 29

2 U.S.C. § 437d 25, 29

5 U.S.C. §§ 3345-3349d 36

7 U.S.C. § 2(a)(2)(A)(ii) 37

15 U.S.C. § 78d-1 38

15 U.S.C § 78w(a)(1) 38

15 U.S.C. § 2053 ..... 30, 37

15 U.S.C. § 41 ..... 37, 39

19 U.S.C. § 1330(a) 25

19 U.S.C. § 1330(d) 25

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*

Section 3(a), 29 U.S.C. § 153(a) 1, 3, 16, 18, 25

Section 3(b), 29 U.S.C. § 153(b) ..... *passim*

Section 10(e), 29 U.S.C. § 160(e) 6

Section 10(f), 29 U.S.C. § 160(f) 6

Section 10(j), 29 U.S.C. § 160(j) 6

30 U.S.C. § 823(d)(2)(A)(iii) 31

33 U.S.C. § 921(b)(5) 38

42 U.S.C. § 2000e-4 37

Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016, 3039-40 § 202(a) 30

National Labor Relations Act (Wagner Act), 49 Stat. 452 (1935), codified at 29 U.S.C. § 151 *et seq.* ..... *passim*

Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 3(b), 80 Pub. L. No. 101, 61 Stat. 136, 139 (1947), codified at 29 U.S.C. § 151 *et seq.* ..... *passim*

The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, codified at 29 U.S.C. § 151 *et seq.* 38

16 C.F.R. § 4.14(b) 39

17 C.F.R. § 200.41 38

TABLE OF AUTHORITIES – Continued

Page

17 C.F.R. § 200.60 38

29 C.F.R. § 102.46(a) 8

MISCELLANEOUS

H.R. 320, 80th Cong. (1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1947) 33

S. 1126, 80th Cong. (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1947) 33

S. Rep. No. 105, 80th Cong. 1st Sess. (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1947) 4, 18

SEN. COMM. PRINT, COMPARISON OF S. 2926 (73d Cong.) and S. 1958 (74th Cong.) (1935) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1947) 33

H.R. Rep. 80-510, 80th Cong. 1st Sess. (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1947) 33

The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights: Hearing Before the S. Subcomm. on Employment and Workforce Safety and H. Comm. on Health, Employment, Labor, and Pensions, 110th Cong., 1st Sess. (2007) 26

TABLE OF AUTHORITIES – Continued

Page

Consumer Product Safety Comm'n, 2009 PERFORMANCE BUDGET REQUEST (Feb. 2008) 30

Office of Legal Counsel, Dep't of Justice, *Quorum Requirements*, 2003 WL 24166831 (March 4, 2003) 7

Federal Election Comm'n, FISCAL YEAR 2010 CONGRESSIONAL JUSTIFICATION & PERFORMANCE BUDGET (May 7, 2009) 29

Federal Mine Safety and Health Review Comm'n, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR COMMITTEE ON APPROPRIATIONS FY 2006 30

NLRB Thirteenth Annual Report (1949) 5

U.S. Government Accounting Office, REPORT ON THE NLRB: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS (1991) 33

2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS 23

2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION (6th ed. 2000) 18

RESTATEMENT (THIRD) OF AGENCY (2006) 23

ROBERT'S RULES OF ORDER (10th ed. 2001) 34

Black's Law Dictionary (3d ed. 1933) 20

The Random House Dictionary of The English Language (Unabridged ed. 1971) 20

TABLE OF AUTHORITIES – Continued

Page

James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005) 34

John E. Higgins, Jr., *Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941 (1998) 6, 32

John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. LAW. 1 (2000) 5

Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707 (2006) 34

Ronald Turner, *On the Authority of the Two-Member NLRB: Statutory Interpretation Approaches and Judicial Choices*, U. HOUSTON PUB. L. & LEGAL THEORY SERIES 2009-A-33 (2009) 34

OPINIONS BELOW

The opinion of the court of appeals is reported at 564 F.3d 840. Appendix to Petition for Writ of Certiorari ("Pet. App.") 1-25. The decisions and orders of the National Labor Relations Board are reported at 353 NLRB Nos. 13 and 25. Pet. App. 26-81.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 2009. The petition for writ of certiorari was filed on May 22, 2009. The petition was granted by this Court on November 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3(a) and (b) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 153, is set forth below. The provision, in its entirety is set forth in the addendum to this brief.

§ 153. National Labor Relations Board

(a) **Creation, composition, appointment, and tenure; Chairman; removal of members**

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations

Act, 1947 [29 U.S.C. § 141 *et seq.*], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) **Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal**

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a

request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

STATEMENT OF THE CASE

A. Background

This case asks the Court to determine whether in 29 U.S.C. § 153(a), (b), Congress permitted a two-member NLRB to decide unfair labor practice and representation cases.

The National Labor Relations Act ("NLRA" or "Act") promotes labor peace by ensuring certain rights or remedies for employees, employers and labor organizations. The NLRB was established to adjudicate and enforce these rights and remedies.

Congress created the Board in 1935, in the Wagner Act, which provided for a three-member Board, and stated that "a vacancy in the Board shall

not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." Act of July 5, 1935, ch. 372 § 3(b), 49 Stat. 449, 451. In 1947, Congress enacted the Taft Hartley Act, which, among other changes, expanded the Board from three to five members, and permitted the Board to delegate any or all of its powers to "any group of three or more members." The Taft-Hartley Act also revised Section 3(b) of the Wagner Act by stating that a "vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 3(b), 80 Pub.L. 101, 61 Stat. 136, 139 (1947) (codified at 29 U.S.C. § 153(b)). The Board was expanded to make it more efficient and to better manage significant delays that plagued the Board in those days. *See* S. Rep. No. 105, 80th Cong. 1st Sess. 8 *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 407, 414 (1947) ("LEG. HIST. 1947"). *See also Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981) (Congress added the delegation provision "to enable the Board to handle an increasing caseload more efficiently.").

In the year following enactment of the Taft-Hartley Act, the Board began delegating decision-making authority in individual unfair labor practice and representation cases to panels of three members. NLRB Thirteenth Annual Report at 8-9 (1949). Even though delays and backlogs persisted in the years since 1947, due, in part, to the frequency of vacancies on the Board, the Board did not issue a reported decision by a panel of less than three members.[1] Moreover, Board members have publicly stated that the Board cannot issue decisions when it has fewer than three members on the panel or group. *See* John C. Truesdale,[2] *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. LAW. 1, 6, 13 & n.37 (2000) (noting that pursuant to the Board's procedure, "no case will issue unless it reflects the majority opinion of the full Board" and adding: "The continuing problem of Board member

---

[1] The Board has issued decisions of three-member panels in which a member was recused or did not otherwise participate in the decision on the merits. In *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), the Ninth Circuit considered whether a Board decision, issued by a three-member panel on the day that one panel member resigned, was valid. The resigning member had participated in the decision. In dicta, the Ninth Circuit stated that even if the resigning member "did not participate in the Board's decision, the decision would be valid because a 'quorum' of two panel members supported the decision." 678 F.2d at 123.

[2] Mr. Truesdale is a former Chairman (1999-2003) and Executive Secretary of the NLRB.

turnover and vacancies . . . was at its worst in the first year of the Clinton presidency when the Board actually fell to two members, less than the necessary quorum."); John E. Higgins, Jr.,[3] *Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941, 954 & n.43 (1998) (commenting: "For a short period in 1993, the Board actually fell to two members, one short of its statutory quorum" and noting: "During this period, the Board could not act on contested cases. Anticipating the loss of a quorum, the Board delegated the section 10(j) authority to the General Counsel.").[4]

In 2003, in response to a May 16, 2002 request from the NLRB for an opinion whether the Board could issue decisions in the event three of the five seats on the Board were vacant, the Office of Legal Counsel, U.S. Department of Justice ("OLC"), concluded, although not free from doubt, that the Board

---

[3] Mr. Higgins, a career NLRB attorney, has served in various capacities since 1964, including Board Member, Board Solicitor and Deputy General Counsel. 47 CATH. U. L. REV. 941 at n.*.

[4] The Board's "10(j)" authority is the authority to seek injunctive relief in certain unfair labor practice cases. At the same time that the Board delegated its authority to three members in 2007, anticipating that this "group" would fall to two members in a matter of days, the Board also delegated its authority to initiate and prosecute injunction proceedings under Section 10(j), and to seek enforcement of Board orders in the courts of appeals under Section 10(e) and 10(f) of the NLRA to the General Counsel. Minute of Board Action (Dec. 20, 2007). Addendum at 4a.

could delegate its powers to a group of three members in contemplation of the departure of one of those members, and that the later departure of one of those members would not impair the remaining members' power to issue decisions. The OLC characterized this delegation as an "arrangement." 2003 WL 24166831 (OLC March 4, 2003).

At the end of 2007, the Board was faced with the prospect of three vacancies. Effective midnight on December 28, 2007, the then-sitting four members of the Board delegated to three of them – members Liebman, Schaumber and Kirsanow – as a "three-member group, all of the Board's powers. . . ." Minute of Board Action, December 20, 2007. *See* Addendum at 5a. On December 31, 2007, the recess appointments of two of the four members, including member Kirsanow, expired. For almost two years, since January 1, 2008, the remaining two Board members have issued decisions in unfair labor practice and representation cases. Congress has yet to confirm any additional Board members.

B. The Proceedings Below

New Process purchases large rolled coils of steel, slits them, and sells them to end-users. New Process engaged in collective bargaining with a newly-certified union for approximately one year, and reached agreement on an initial contract, subject to ratification by the union. The union initially notified New Process that the contract had been ratified, but

when employees reported irregularities in the ratification process – namely that the employees voted *against* ratification – the union insisted it was nonetheless effective. New Process advised the union that the contract had not been ratified and the parties should return to the bargaining table. New Process subsequently withdrew recognition from the union based on a petition from a majority of employees in the bargaining unit asking the company to do so. The union initially filed an unfair labor practice charge alleging that New Process unlawfully repudiated the collective bargaining agreement. It later filed a second charge alleging that New Process unlawfully withdrew recognition from the union.

An administrative law judge for the NLRB ruled against New Process on the first unfair labor practice charge on May 1, 2008. New Process filed exceptions with the NLRB.[5] On September 25, 2008, NLRB Members Schaumber and Liebman issued a "Decision and Order" affirming the recommended Order of the administrative law judge. The same two Board members issued a decision on September 30, 2008, on cross-motions for summary judgment arising out of the union's second unfair labor charge, finding that New Process unlawfully withdrew recognition from

---

[5] Filing exceptions with the Board is the method for seeking appellate review by the NLRB of a decision of an administrative law judge in unfair labor practice cases. Exceptions must be filed within twenty-eight days of an ALJ's decision. *See* 29 C.F.R. § 102.46(a).

the union, and issued a remedial order against New Process.

New Process appealed from both decisions to the Seventh Circuit, which consolidated the cases. The Seventh Circuit first considered whether the Board could lawfully issue a decision when it consisted of only two members, and then considered whether New Process violated the Act. The Seventh Circuit ruled in favor of the NLRB on both issues. In addressing the delegation and quorum provisions of Section 3(b), it held:

> As we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the NLRB's delegation procedure.

Pet. App. 10-11.

In addition to its plain meaning evaluation, the court of appeals justified its conclusion by relying on the OLC's opinion letter, the decision of the First Circuit in *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *pet. for cert. pending* (No. 08-1878) and dictum from *Photo-Sonics, Inc. v. NLRB*, 678 F.2d at 123 (where the Ninth Circuit observed the

two remaining members of a three-member panel that heard and decided the case but lost a member on the day the decision was released could do so as a quorum of two under Section 3(b) of the Act). Pet. App. 11-12.

The court below dismissed New Process's textual and public policy arguments as unpersuasive. The court of appeals observed that over 300 opinions had been decided by a "two-member quorum." Pet. App. 9.

On the same day that the Seventh Circuit rendered its decision, the D.C. Circuit decided that the requirement that the Board have at least three members "at all times" meant that when the Board consisted of only two members, it lost the power to act because any powers that had been delegated to the three-member group automatically ceased. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *pet. for cert. pending* (No. 09-377). Pet. App. 82-98.

The D.C. Circuit's textual analysis differs markedly from the Seventh Circuit's, focusing on its observance of rules of construction requiring the court to construe a statute "so that no provision is rendered inoperative or superfluous, void or insignificant" [citations omitted]. Pet. App. 88-89. On this foundation, the D.C. Circuit held:

> Specifically, the Board's position ignores the requirement that the Board quorum requirement must be satisfied "*at all times*." 29 U.S.C. § 153(b) (emphasis added). Moreover,

it ignores the fact that the Board and delegee group quorum requirements are not mutually exclusive. The delegee group quorum provision's language does not eliminate the requirement that a quorum of the Board is three members. Rather, it states only that the quorum of any three-member delegee group shall be two. *Id.* The use of the word "except" is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value. *See id.* The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members. Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, "at all times," satisfied. *Id.* But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.

Indeed, if Congress intended a two-member Board to be able to act as if it had a quorum, the existing statutory language would be an unlikely way to express that intention. The quorum provision clearly requires that a quorum of the Board is, "at all times," three members. 29 U.S.C. § 153(b).

Pet. App. 89.

The D.C. Circuit relied also on the law of agency and corporations mandating the termination of a delegation when the delegating authority ceased to exist. The court was not persuaded by the force of decisions in cases involving other governmental entities that were authorized to act notwithstanding defects in their composition, finding these cases and their statutory settings to be distinguishable.

The Second Circuit was the next to weigh in. *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 415 (2d Cir. 2009). There, the court of appeals concluded that neither canons of construction nor any other interpretational methodology was enlightening enough to resolve the linguistic puzzle, so the court deferred to the agency and affirmed the authority of a two-member board to conduct its adjudications.[6]

Finally, the Fourth Circuit had its turn. In *Narricot Indus. L.P. v. NLRB*, Nos. 09-1164, 09-1280, 2009 WL 4016113 (4th Cir., Nov. 20, 2009), the court embarked upon yet another linguistic adventure. It reasoned that the D.C. Circuit's analysis would read

---

[6] The Tenth Circuit recently joined the Second in deferring to the NLRB. *Teamsters Local Union No. 523 v. NLRB*, Nos. 08-9568 and 08-9577 (10th Cir., Dec. 22, 2009). The courts deferred to the NLRB, but it was the OLC that authorized the two-person board. The NLRB was following the OLC opinion, not its own specific ruling. Assuming that deference might be a proper inquiry in a matter of statutory interpretation like this one, OLC is not entitled to deference. It is not the agency that administers the NLRA. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).

the two-member quorum clause and the vacancy clause out of the statute. The court believed that based on the plain language of the statute, and giving effect to all of its terms, a two-member quorum was permitted to act for the Board even if they were the only two members of a three-member group.

This Court now has agreed to review the decision of the Seventh Circuit.

SUMMARY OF ARGUMENT

This case invokes three cardinal principles of statutory construction: Words and clauses in a statute cannot be ignored; each of them should be accorded its ordinary and natural meaning. Conflicts that arise between words and clauses must be resolved in a way that harmonizes them without diminishing the force or meaning of any of them. And, each word and clause must be considered in its context so that no meaning is lost by unnaturally narrow focus.

Application of these principles to Section 3(b) of the NLRA, as amended by the Taft-Hartley Act, leads to the conclusion that the NLRB is authorized to decide cases so long as at least three members are present in a "group" that has been delegated any or all the powers of the Board by the whole Board. A vacancy on the Board only, as distinct from a delegee group, will not deprive the Board of its authority to decide cases unless the vacancy or vacancies deprive

the Board of a quorum of at least three members, because three members must be present "at all times." In contrast, a delegee group that is duly authorized by the Board may act if two members, *i.e.*, a majority or a two-member quorum, agree. When there are only two members on the Board itself, however, there is no Board, no operative authorized delegee group, and no authority to issue decisions. By this formula, all of the words count and none tyrannizes another. Giving meaning to each of the words and phrases in this setting eliminates any ambiguity and leads to a rational operating construct for the NLRB.

The D.C. Circuit in *Laurel Baye Healthcare* was right in following this simple prescription. The other courts, including the Seventh Circuit below, violated or ignored the rules of interpretation set down by this Court. All of them ignored the "at all times" clause, treating it as having been repealed by the "exception" for the two-member quorum of a fully empowered three-member group. And, none of them accorded significance to the differences suggested by the terms "Board" or "group," rendering this linguistic distinction irrelevant. The "at all times" clause for the Board, however, is not limited or overridden by the majority rule exception for a quorum of a three-member group. The Fourth Circuit accorded the "vacancy" clause more force than it can bear and the Second Circuit's default to deference is inappropriate. The requirements for deference are not present here and the NLRB has not asked for it.

Available collateral aids for determining statutory meaning reinforce the conclusions mandated by the plain language. The D.C. Circuit correctly analogized the general and common law of agency and corporations to support the premise that when the delegating and delegee entities were no longer properly constituted, they lost the authority to decide cases. These common law principles are presumed to be embedded in federal statutes in the absence of an express intent to the contrary. The requirement of a three-person group also makes good sense. Decision-making by odd-numbered bodies is commonplace; even-numbered or even two-member adjudicatory bodies are not. The vigor of dissent cannot inform decisions of a two-member Board.

Moreover, since the enactment of Taft-Hartley, the NLRB has abided by the minimum three-member requirement for action by the delegee group. Board members and executives have articulated the point over many years. Unrelated federal boards and commissions similarly have refrained from acting when their membership fell below their statutorily authorized numbers. By contrast, no agency has embraced the view offered by the OLC and Board in this case because the Board and the OLC's theory defies common sense, as well as the plain language of the Act.

There are many valid ways Congress and the President can solve the problems posed by an undersized NLRB, but the one preferred by the court below is not one of them.

Restoring what the NLRA requires will not significantly disrupt national labor policy as much as it has already been distorted by decisions by the current two-member Board. The current Board members have admitted to compromising their views of the proper interpretation of the NLRA in order to promote institutional continuity.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE NLRA DOES NOT AUTHORIZE A TWO-PERSON BOARD

Despite the divergent approaches of the courts of appeals, a straightforward plain language analysis yields a simple answer that comports with common sense and harmonizes all of the statutory provisions. Such a review of all of the words of Section 3(a) and (b) of the Act leads naturally to the conclusion that a Board that consists of only two members shorn from a previously authorized group of three does not have legal authority to decide NLRB cases. Ambiguities arise in this statute only by leaving out certain words in the statute, or overemphasizing the significance of some words by according them enhanced meaning to the detriment of other words in the statute.

In deciding the question presented here, the NLRB, the Department of Justice, and the various circuit courts (other than the D.C. Circuit) all fail to provide a plausible statutory justification for a

two-member Board. Instead, they argue that if these two members cannot act, an important law is inoperative and unable to fulfill Congress's expectations in enacting it. A natural judicial impulse in this setting is to give the most force to words that produce the least undesirable outcome. *See Laurel Baye Healthcare*, Pet. App. 97 (acknowledging that "[b]oth [the Board and OLC's actions] were undoubtedly born of a desire to avoid the inconvenient result of having the Board's adjudicatory wheels grind to a halt. Nevertheless, we may not convolute a statutory scheme to avoid an inconvenient result.").

The principal rules of statutory construction applied by this Court lead to the conclusion reached by the D.C. Circuit. If each word and phrase is given equal force with its neighbors and the words and phrases are harmonized in a way that no one word or phrase deprives another of meaning, there is no ambiguity in this law. Congress did not intend to authorize two members to act in the absence of at least one more.

A. Well-Established Principles of Statutory Construction Require that All Words and Phrases Be Given Effect

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2350 (2009), *quoting*

Engine Mfr. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004).

In this interpretative exercise, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) *quoting* 2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION § 46.06 at 181-86 (6th ed. 2000). Context is important as well and it provides insight into the meaning and interplay of the words and phrases of the statute as a whole. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). These guideposts lead to a full understanding of Congress's intent in this case.

Section 3(a), as amended by the Taft-Hartley Act, provides that the NLRB is "continued" (after enactment of Taft-Hartley) with "five instead of three members." 29 U.S.C. § 153(a). Congress enlarged the size of the Board to streamline procedures, reduce delay and eliminate backlogs. *See* S. Rep. No. 105 *reprinted in* 1 LEG. HIST. 1947 at 417. The language of this provision is neutral for determining the validity of a two-member Board. The intent to increase efficiency points in no particular direction. It may be inefficient to have a 60% vacancy problem but this clause does not inform the issues by its terms or in any apparent way other than to define the NLRB as a five-member entity.

The next relevant phrase appearing in Section 3(b) of the Act, as amended, is: "The Board is

authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b). This provision expresses an intent to allow the Board as a whole to delegate its powers to a "group" of three or more Board members. The intent, again, is to improve the efficiency of the Board by dividing up the work. No other provision authorizes the delegation of the Board's powers to an entity that is smaller or different than a full strength, five-member Board.

The next sentence is an amalgam of both Wagner Act segments and Taft-Hartley segments and is the minefield that has caused the confusion here. The first clause, a Wagner Act holdover, provides: "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." The second clause, added by Taft-Hartley, states "and three members of the Board shall, at all times constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." 29 U.S.C. § 153(b).

The vacancy clause can mean only that a vacancy that does not reduce the Board below a minimum number of members required for action will not affect the Board's ability to act. Otherwise, the vacancy clause would override the quorum clauses. By its plain terms, however, the vacancy clause refers only to the "Board" itself and not to "any group of three or more members." Had Congress meant to apply the provision to the Board as well as any group of three

or more members of the Board, it would have said so. The courts of appeals which have endorsed decisions by a two-member Board rely on the vacancy clause but ignore the company the words keep. *See, e.g., Narricot, supra*, slip op. at 10. The quorum clauses and vacancy clause easily live in harmony when the vacancy clause is applied, as it is written, only to the Board. The vacancy clause does not bear the power to authorize a two-member Board.

The two quorum provisions, in their context, also make sense.[7] The Board quorum of three members in the middle phrase of the sentence lays down a clear rule requiring that "at all times" there must be three members present for the Board to issue decisions.

The natural meaning of the clause is two-fold. First, the fully constituted five-member Board may decide a case if three members agree. But, second, "at all times," the Board needs no less than three deciders to decide cases.

The two-member quorum applicable to any three-member "group" delegated in accordance with the first sentence of Section 3(b) does not in any obvious

---

[7] A "quorum" is defined typically as "the number of members of a group or organization required to be present to transact business legally, usually a majority." *The Random House Dictionary of The English Language*, at 1182 (Unabridged ed. 1971). This was the definition in effect at the time Congress enacted the Wagner Act and the Taft-Hartley Act. *See Black's Law Dictionary* 1489 (3d ed. 1933) (defining quorum as "a majority of the entire body").

way amend or modify the Board quorum requirement of three which must be present at all times. As the D.C. Circuit held in *Laurel Baye Healthcare*, "the word 'except' is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value." Pet. App. 89.[8]

Giving meaning to all the words without diminishing the force of any of them, the relevant phrases say that three members have the authority to reach decisions whether the Board consists of three or four or five members, but that at a minimum, three members must always be present for the Board to issue decisions. At the same time, when there is a delegation to a group pursuant to the first sentence of Section 153(b), the three members of the group can reach decisions by a majority of two. A vacancy in a

---

[8] Even so, when Congress provided that "two members shall constitute a quorum of any group designated pursuant to the first sentence hereof," it contemplated that the three or more member group would remain in existence. Until January 1, 2008, the Board's practice in issuing decisions was consistent with this view. The members of the panel who have decided the case (or, in the case of a decision by the full Board, the members of the Board) are identified in every reported decision. Since January 1, 2008, however, despite the fact that the NLRB designated members Schaumber, Liebman and Kirsanow to exercise the Board's powers, the decisions identify only Schaumber and Liebman as the panel. The Board did not designate only those two members to exercise its powers. And Kirsanow, as a private citizen, cannot be a member of any properly designated group of the Board.

three-member group precludes any action by that group unless the missing member is replaced.[9]

By this analysis, any conflict is resolved and all the words matter. The Board and the Department of Justice, together with the court below, needed to ignore the "at all times" requirement. They either failed to mention it or failed to give it any significance. They also accorded no relevance to Congress's undeniable distinction between "Board" and "group." According to the interpretation and theory advocated by the NLRB and accepted by the Seventh Circuit, these words mean nothing.

According to the NLRA, only the Board is authorized to act, the Board cannot issue decisions if its membership falls below three, and a quorum of a delegee group that is not fully constituted does not substitute for the Board.

---

[9] By contrast, a recusal or a failure to participate in a decision for any reason does not preclude two members of a three-member group from issuing a decision, since there are three actual members of the group. The NLRB has issued such decisions on rare occasions. *See, e.g.*, *Wisconsin Bell*, 346 NLRB 62 (2005). In those cases, the decision is still issued by all three members of the panel. *Id.* at n.2 (stating: Decision and Order issued "BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER" but noting that "Member Liebman did not participate in the decision on the merits.") Here, the Board claims that Members Liebman and Schaumber are a quorum of a three-member group, but this three-member group does not exist and the decisions were issued by only Chairman Schaumber and Member Liebman. Pet. App. 28; 72.

1. Common Sense and Common Law Principles Support the D.C. Circuit's Plain Language Construction

The analogy to the law of agency and corporations used by the D.C. Circuit may be presumed to have influenced a Congress sitting in 1947, and it is a persuasive analogy as well. The D.C. Circuit relying on the RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006), and William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, explained that the Board's adjudicatory powers were suspended when its membership fell below the quorum specified in the statute. *Laurel Baye Healthcare*, Pet. App. 91, citing 2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 421 ("If there are fewer than the minimum number of directors required by statute, [the remaining directors] cannot act as a board."). Here, the Board's authority to issue decisions lapsed when it lost a quorum, so the group's authority to issue decisions also expired. Pet. App. at 91.[10]

---

[10] It also follows that a group acting with "all of the powers" of the Board loses its ability to decide cases when its membership falls below three. The NLRB has argued that the delegee group stands in the shoes of the Board. *See* NLRB, Petition for Rehearing and Suggestion for Rehearing En Banc at 14, *Laurel Baye Healthcare*, 564 F.3d 469 ("[T]he Board members in the group have been jointly delegated all of the Board's institutional powers, and thus are fully empowered to exercise them, not as Board agents, *but as the Board itself.*") (Emphasis added). If, as the NLRB argues, a delegee group imbued with "all of the powers" of the Board may take advantage of the vacancy provision, it follows that such a group is also bound by

(Continued on following page)

When Congress legislates, there is a strong presumption that well-established principles of common law and general law are intended to be applied in the ordinary way. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles. . . . Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." (citations omitted)); *see Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) (recognizing that Congress is familiar with common law principles and that these principles are embedded in federal statutes absent express intent to the contrary; statutes "cannot be understood in a historical vacuum."); *see also United States v. Texas*, 507 U.S. 529, 534 (1993).

---

the Board's quorum provision. It cannot be both ways. Either the vacancy provision does not apply to a group in accordance with the express terms of the statute, or a group delegated with all of the powers of the Board is bound by both the Board's vacancy provision and the Board's quorum provision. Either way, the result is the same: a delegee group cannot issue decisions with only two members. Also, the delegee group cannot issue decisions with only two members because the group, as the entity that received the delegation, was no longer fully constituted and therefore no longer a proper delegee. This does not diminish the authority delegated to the Regional Directors or General Counsel because they are still properly constituted entities.

The principles of corporate and agency law identified by the D.C. Circuit and applied in informing the court's understanding of the language at issue here validate the proposition that Congress was not guilty of inattentive drafting when Section 3(a) and (b) were amended in 1947. It makes good sense that Congress would employ these principles in addressing the concerns raised by vacancies and the Board's authority to act.

In this case, common sense and considerations of effective legislating also enlighten the plain language analysis and are relevant considerations. Congress would not in the first instance have created a board or commission with adjudicatory powers affecting private adverse parties, consisting of an even number of members. Entities with an even number of members which must achieve supermajority rule are rare and reflect special considerations not present here.[11]

---

[11] For example, the Federal Election Commission consists of six members, but its enabling statute specifically states that "the affirmative vote of 4 members of the Commission" is required in order for the Commission to initiate, defend or appeal any civil enforcement action, render advisory opinions, develop forms or make, amend, or repeal rules, conduct investigations and hearings and report violations. 2 U.S.C. §§ 437c(c), 437d(a)(6)-(9). Supermajority rule here ensures that action cannot be taken on a purely partisan basis. The International Trade Commission similarly has six members, but its enabling statute spells out specifically the effect of divided votes in certain determinations and specifies that the President may decide which result should be considered the determination of the Commission. *See* 19 U.S.C. § 1330(a), (d).

The NLRB is not one of them even though in the Wagner Act, some decisions were issued by two members. Congress changed this in the Taft-Hartley Act. While the loss of a member from time to time on an adjudicatory board or commission is to be expected, Congress knows how to avoid the consequences of a loss of majority rule decisionmaking in organic legislation.[12]

Majority rule, which contemplates an odd number of deciders, is important. It improves the quality of decisionmaking and sharpens both the debate and opinions. It sharpens the law as well. Common sense suggests that Congress intended to promote and preserve this beneficial environment for decisionmaking by facilitating the expression of minority views. *See The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights: Hearing Before the S. Subcomm. on Employment and Workforce Safety and H. Comm. on Health, Employment, Labor, and Pensions*, 110th Cong., 1st Sess. (2007) (statement of Robert J. Battista, Chairman, NLRB) ("[D]issent is healthy for many reasons, including the assurance dissent provides that the members in the majority have considered carefully opposing views and arguments."). In the legislative process, these important considerations are not ignored.

---

[12] *See infra* pp. 36-39.

Here, the common sense outcome is fully consistent with the plain language theory of statutory construction. *See United States v. Turkette*, 452 U.S. 576, 588 n.10 (1981). It makes no sense to assume that Congress in enacting Taft-Hartley would prefer a deeply compromised two-member board to a properly comprised board of at least three members. It is hard to envision anything beneficial about a two-person board except that it would avoid a shutdown. There are other much better ways to accomplish this end.

2. The Theories Adopted by the Other Circuits Cannot Be Reconciled with Each Other or the Words of the Statute

The Seventh Circuit and the other courts that agree with it add little clarity to the discussion. The First and Fourth Circuits accord no significance to Congress's distinction between "Board" and "group," and to the statutory admonition that the "Board" must be comprised of three members "at all times." *See Northeastern Land Servs.*, 560 F.3d at 41; *Narricot Indus.*, *supra*, slip op. at 8-9. The Fourth Circuit justifies its conclusion on the belief that the vacancy clause "necessarily" applies to a group as if they were interchangeable. *Id.*, slip op. at 10. These words may have seemed inconsequential to the courts but they are present and they should be given the obvious meaning that Congress intended.

The Second Circuit's default to deference is neither satisfactory nor appropriate. *See Snell Island SNF LLC*, 568 F.2d at 423. On a careful reading, there is no obvious ambiguity in the statute and this forecloses a deference inquiry. But of greater importance, there is no proper foundation for deference in a case like this one which presents a question of pure statutory interpretation which is best suited to judicial resolution. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987). The Second Circuit does not explain which special insight the Board (or a two-member group)[13] or the OLC brings to the table in a matter like this. The deletion of statutory terms is not a proper use of deference jurisprudence in any event. Deference principles are not helpful in this case.

B. Other Agencies Have Abided By Their Quorum Constraints

The inability of a federal government agency or commission to act because of the absence or lack of a quorum is not unprecedented. When that has occurred, other agencies, unlike the NLRB, have refrained from acting. For example, in early 2008, the Federal Election Commission ("FEC") lacked four of the six members authorized by Congress to comprise

---

[13] Even if deference were appropriate, it is undermined by the Board's failure to conduct rulemaking or engage in any public deliberative process. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

the Commission. *See* 2 U.S.C. § 437c(a)(1).[14] As a bipartisan commission, the FEC requires a super-majority (67%) to act. Its enabling statute requires "the affirmative vote of 4 members of the Commission" for the FEC to conduct its core business. *See* 2 U.S.C. §§ 437c(c), 437d(a)(6)-(9). When it lacked a quorum, the FEC did not continue to act. As it reported to Congress:

> Fiscal year 2009 presented the FEC with a unique challenge in conducting its day-to-day operations. Specifically, for the first six months of the calendar year the Commission only had two Commissioners and therefore lacked a quorum and was unable to take action on many core business matters.

Federal Election Comm'n, FISCAL YEAR 2010 CONGRESSIONAL JUSTIFICATION & PERFORMANCE BUDGET (May 7, 2009) at 4 (available at www.fec.gov/pages/budget/fy2010/FY_2010_CJ_Bud_05_07final.pdf (last viewed Dec. 11, 2009)). *See also id.* at 6 n.2, 14, 16 (reporting that due to a lack of quorum, the FEC was unable to achieve several of its performance targets, could not open or close cases under its administrative fine program, approve or conduct audit reports or

---

[14] This occurred even though Congress provided that "[a] member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission." 2 U.S.C. § 437c(a)(2)(B).

meet a statutory deadline for implementing certain rules).

Similarly, in 2006, when the chairman of the Consumer Product Safety Commission ("CPSC") stepped down, the agency was left with only two commissioners.[15] Without a three-member quorum, the agency was unable to sue manufacturers or demand recalls. *See* Consumer Product Safety Comm'n, 2009 PERFORMANCE BUDGET REQUEST (Feb. 2008) at 8 (available at www.cpsc.gov/cpscpub/pubs/reports/2009plan.pdf (last viewed Dec. 11, 2009)). In 2004, the absence of a quorum on the Federal Mine Safety and Health Review Commission prevented the Commission from issuing decisions within the time-frame set out in the agency's performance goals. *See* Federal Mine Safety and Health Review Comm'n, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR COMMITTEE ON APPROPRIATIONS FY 2006 at 2, 15, 18 (noting that "[b]y law, a quorum of three Commissioners is required to consider and decide cases appealed from the Commission's ALJs" but the Commission could not issue opinions in a timely manner "due to a lack of a quorum of Commissioners for most of fiscal

---

[15] At that time, the Consumer Product Safety Act provided that in the case of a vacancy, two members could constitute a quorum for six months. *See* 15 U.S.C. § 2053(d). When a third member was not appointed within six months, Congress passed legislation that extended the two-member quorum provision for another six months. *See* Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016, 3039-40 § 202(a).

year 2003.") (available at www.fmshrc.gov/plans/fy06budget.pdf (last viewed Dec. 11, 2009). *Cf. Secretary of Labor, Mine Safety and Health Admin. v. Cannelton Indus.*, 26 FMSHRC 146, 2004 WL 787220 (F.M.S.H.R.C. March 12, 2004) (where four Commissioners of the FMSHRC denied a motion to dismiss a petition for discretionary review granted by the FMSHRC at a time when it consisted of only two commissioners, because, among other things, the Commission believed that the Mine Act's provision for discretionary review by two Commissioners "allows the business of the Commission to continue so that meritorious cases may proceed to briefing during the infrequent instances where there are only two sitting Commissioners" and distinguished the FMSHRC from the NLRB "which must act with three members." *Id.* at 3-4 (citing 30 U.S.C. § 823(d)(2)(A)(iii)) (permitting review by the Commission "only by affirmative vote of two of the Commissioners present and voting"). And for more than ten months, the Occupational Safety and Health Review Commission (OSHRC) "lacked a quorum to take official action." *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1041 (7th Cir. 1989) (where OSHRC consisted of a single commissioner, and the commissioner declined OSHRC review of an administrative law judge's decision because without a quorum, any review would have been a futile gesture).

The NLRB stands alone among the various administrative agencies in failing to adhere to the quorum provisions Congress mandated.[16]

C. The Actions of the NLRB Since 1947 Reinforce the Plain Meaning of the Statute

Since passage of the Taft-Hartley Act in 1947, the Board has routinely delegated unfair labor practice and representation cases to groups of three members, known as panels. The panel system is flexible and fluid, permitting members to join panels at their discretion and allowing members to insist that cases of first impression or that raise important policy matters be decided by the full Board. *See* Higgins, 47 CATH. U. L. REV. at 953. Although the Board had numerous vacancies and concomitant case backlogs in the decades since 1947, with one reported exception where three members participated in the decision, but one member resigned on the day the decision was released, the Board did not issue decisions by less than a three-member panel.[17] If the intent of the Taft-Hartley Act

---

[16] Two prominent former members of the Board, however, have publicly stated that the Board cannot issue decisions without a quorum of three members. *See supra* at pp. 5-6.

[17] Under the Wagner Act, the Board, at times, issued decisions with two members where the third Board seat was vacant. Those decisions were valid under the quorum and vacancy provisions of the Wagner Act. They have no bearing on decisions of the Board following its expansion to five members

(Continued on following page)

was solely to promote efficiency, one would have expected the Board to issue numerous two-member panel decisions where a third panel member's term had expired. That has not been the case. Instead, the Board reconstituted its panels – often repeatedly – to fill vacancies created by departed members, often resulting in long delays but decisions by at least three members. *See* U.S. Government Accounting Office, REPORT ON THE NLRB: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS 45-62 (1991).

The NLRB's historical practice and composition reinforce the proposition that a minimum of three members is required for Board adjudications. As originally established, the NLRB was to be "strictly nonpartisan" and composed of "three impartial government members." *See* SEN. COMM. PRINT, COMPARISON OF S. 2926 (73d Cong.) and S. 1958 (74th Cong.) § 3 (1935), *reprinted in* 1 LEG. HIST. 1947 at 1319, 1320. When Congress enlarged the Board to five members in the Taft-Hartley Act, it considered, but did not alter, the nonpartisan composition of the Board.[18] *See* H.R. Rep. 80-510 at 36-37 (1947),

---

and the revision of the quorum requirement under the Taft-Hartley Act.

[18] *Compare* H.R. 320, 80th Cong. (1947), § 3(a) *reprinted in* 1 LEG. HIST. 1947 at 44, 171 (limiting the number of members who could belong to one political party) *with* S. 1126, 80th Cong. (1947), § 3(a), *reprinted in* 1 LEG. HIST. 1947 at 106, 233-34 (containing no such provision).

reprinted in 1 LEG. HIST. 1947 at 540-41. *See also* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 244 & n.110 (2005) (summarizing the floor debate on the Labor Management Relations Act). Over time, however, as a matter of custom, not law, the Board consisted of three members of the President's political party and two members of the opposition. *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 714 & n.42 (2006). *See also* Ronald Turner, *On the Authority of the Two-Member NLRB: Statutory Interpretation Approaches and Judicial Choices*, U. HOUSTON PUB. L. & LEGAL THEORY SERIES 2009-A-33 at 17 n.89 (2009).

That practice makes the presence of at least three Board members critical for an agency like the NLRB that makes policy through adjudication, not rulemaking. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (commenting: "The National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking."). A two-member body does not maximize the potential for meaningful debate or consideration of differing viewpoints. It is simply too small to be representative or even to permit a decision by a majority vote. *See* ROBERT'S RULES OF ORDER, § 3 (10th ed. 2001) ("The requirement of a quorum is a protection against totally unrepresentative action in the name of the

body by an unduly small number of persons."), *quoted in Assure Competitive Transp. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980), *cert. denied*, 429 U.S. 1124 (1981) (holding that the quorum rules permitted the Interstate Commerce Commission to act with fewer than the full complement of the six remaining board members, so long as a quorum of the current board was present). *See also Ballew v. Georgia*, 435 U.S. 223, 232-239 (1978) (summarizing research on the size of decisionmaking groups and concluding that "progressively smaller juries are less likely to foster effective group deliberation. . . . Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.").

Board member (now Chairman) Liebman and member Schaumber have repeatedly acknowledged that the decisionmaking process they engage in skews the historical process of full deliberation. In numerous cases, they have abandoned their view of the NLRA for "institutional reasons," *i.e.*, to produce an ostensibly lawful decision by the agency. *See, e.g., Brighton Retail, Inc.*, 354 NLRB No. 62, n.4 (2009) ("In the absence of a majority to reverse the judge's recommended finding of an interrogation violation, Member Schaumber, for institutional reasons, joins his colleague in adopting that violation."); *Hamilton Sundstrand,* 352 NLRB 482, 483 n.3 (2008) ("Member Liebman dissented in *Disneyland Park*, and she applies it here for institutional reasons only."); *see*

also Essex Valley Visiting Nurses Ass'n, 352 NLRB 427 (2008); *The Lorge School,* 352 NLRB 119 (2008).

D. The Authority to Ensure the Board's Ability to Function Notwithstanding Vacancies Rests with the President or Congress, Not with the NLRB or the Courts

The ability to overcome the potential for paralysis caused by the departure of members of an administrative agency lies with the President or with Congress. Four options are available. First, under the Vacancy Clause, "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST., art. II, § 2.

Second, under the Vacancies Act, 5 U.S.C. §§ 3345-3349d, the President has the ability to direct an officer or employee of an agency to perform the functions and duties of an office that becomes vacant on a temporary or acting basis. *See* 5 U.S.C. § 3345(a)(3).

Third, Congress has the authority to alter the vacancy or quorum provisions for an agency. Even a limited survey of some of the various accommodations Congress has made in other instances demonstrates that Congress has a full range of options available to it to accommodate the loss of members of a commission. For example, in 2008, when the composition of

the CPSC dipped below its statutorily mandated quorum, Congress enacted a temporary provision to allow the Commission to continue to operate. *See* 15 U.S.C. § 2053(d) (stating: "No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission, but three members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the six month period beginning on the date of the vacancy which caused the number of Commission members to decline to two.").

Alternatively, Congress has authorized members to continue to serve on a commission until a replacement is nominated and confirmed. *See, e.g.*, 42 U.S.C. § 2000e-4(a) (Equal Employment Opportunity Commission) ("all members of the Commission shall continue to serve until their successors are appointed and qualified . . . "); 7 U.S.C. § 2(a)(2)(A)(ii) (Commodity Futures Trading Commission) ("Each Commissioner shall hold office for a term of five years and until his successor is appointed and has qualified . . . "); 15 U.S.C. § 41 (Federal Trade Commission) ("That upon the expiration of his term of office a Commissioner shall continue to serve until his successor

shall have been appointed and shall have qualified."). Or, Congress has permitted agencies to temporarily fill vacancies with administrative law judges. *See, e.g.*, 33 U.S.C. § 921(b)(5) (permitting the Chairman of the Benefits Review Board, U.S. Department of Labor, to designate up to four Department of Labor administrative law judges to serve on the Board, "temporarily, for not more than one year.").[19]

Finally, Congress has permitted agencies to promulgate regulations establishing their own quorum provisions. *See, e.g.*, 15 U.S.C. §§ 78d-1, 78w(a)(1) (permitting the Securities and Exchange Commission to promulgate rules of practice, including rules or orders delegating certain specified functions vested in them by Congress) and 17 C.F.R. § 200.41 (SEC regulation stating: "A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter pursuant to 200.60 or are otherwise disqualified from such consideration, is

---

[19] In 1959, Congress used this route to allow the President to appoint an Acting General Counsel in the event that there is a vacancy in the NLRB's Office of General Counsel. *See* The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, codified at 29 U.S.C. § 151 *et seq.*

two, two members shall constitute a quorum for purposes of such matter."); 16 C.F.R. § 4.14(b) (regulation of the Federal Trade Commission stating: "A majority of the members of the Commission in office and not recused from participating in a matter . . . constitutes a quorum for the transaction of business in that matter.").[20]

Here, the President and Congress each chose the fourth option – inaction.

II. REQUIRING THREE MEMBERS AT ALL TIMES FOR THE NLRB TO ACT DOES NOT IMPOSE AN ADMINISTRATIVE BURDEN OR UNDERMINE NATIONAL LABOR POLICY

A decision by this Court invalidating two-member Board decisions would not disrupt national labor policy. According to the Board, there are seventy-seven challenges to the authority of the Board to issue decisions with two members pending in the various courts of appeal. *See* NLRB's Response to FOIA Request ID/LR-2009-0432 (May 29, 2009). In most cases, the Board's orders already have been

---

[20] This Court upheld the FTC's authority to promulgate a quorum provision by regulation in the absence of a specific quorum provision specified by Congress in 15 U.S.C. § 41. *FTC v. Flotill Prods., Inc.*, 389 U.S. 179 (1967). The D.C. Circuit upheld the SEC's regulation as within its general rulemaking authority. *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996).

complied with and thus the issues have been resolved. Any objection to a decision by the two-member Board in those finally decided cases is waived. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-38 (1952) (holding that the failure to object to the authority of a hearing officer to decide a case waives that objection). *See also Pittston Coal Group v. Sebben*, 488 U.S. 105, 122-23 (1988) (finding no duty to reopen finally decided claims, even if decided under erroneous standards). Moreover, the decisions of the two-member Board themselves have disrupted national labor policy, because they reflect no dissent, and the two members who have issued those decisions have repeatedly acknowledged that they have sacrificed their own view of national labor policy in favor of the "institutional" need to issue decisions. It can hardly be said that preservation of this less-than-ideal environment promotes labor peace or advances the beneficial purposes of the NLRA.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

MARK E. SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG, LLP
2101 L St., N.W., Ste. 1000
Washington, DC 20037
Tel: (202) 331-3100

SHELDON E. RICHIE
Counsel of Record
RICHIE & GUERINGER, P.C.
100 Congress Ave., Ste. 1750
Austin, TX 78701
Tel: (512) 236-9220

JOSEPH W. AMBASH
JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
Tel: (617) 310-6091

ADDENDUM

§ 153. National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 *et seq.*], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to

delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) **Annual reports to Congress and the President**

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) **General Counsel; appointment and tenure; powers and duties; vacancy**

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act

(1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or

(2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

MINUTE OF BOARD ACTION

DECEMBER 20, 2007

The Board anticipates that in the near future it may for a temporary period have fewer than three Members of its statutorily-prescribed full complement of five Members.[1] The Board also recognizes that it has a continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible. To assure that the Agency will be able to meet its obligations to the public, the four current Members of the Board (Members Liebman, Schaumber, Kirsanow and Walsh) unanimously decided to temporarily delegate to the General Counsel full authority on all court litigation matters that would otherwise require Board authorization. This delegation is made under the authority granted to the Board under Sections 3, 4, 6, and 10 of the National Labor Relations Act.

Accordingly, the Board delegates to the General Counsel full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j) or Section 10(e) and (f) of the Act, contempt proceedings pertaining to the enforcement of or compliance with any order of

---

[1] The five-Member Board presently has four Members, Chairman Battista's term having expired on December 16, 2007. Two of the remaining Members, Member Kirsanow and Member Walsh, are in recess appointments which will expire at the sine die adjournment of the current session of Congress.

the Board, and any other court litigation that would otherwise require Board authorization; and to institute and conduct appeals to the Supreme Court by writ of error or on petition for certiorari.

The four current Members of the Board also unanimously decided to delegate to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers, in anticipation of the adjournment of the 1st Session of the 110th Congress. The Board is of the view that this action will permit the remaining two Members to issue decisions and orders in unfair labor practice and representation cases after departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group.

The Board acted pursuant to Section 3(b) of the Act, which provides that

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

In addition to the statutory language, the Board relied on the legal analysis and U.S. Circuit Court precedent set forth in the March 4, 2003 opinion

issued by the Office of Legal Counsel of the U.S. Department of Justice (OLC) in response to the Board's May 16, 2002 request for OLC's opinion whether the Board may issue decisions during periods when three or more of the five seats on the Board are vacant. OLC's opinion concluded that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." The Board noted that this is essentially the same theory that the Board has historically used in situations where one member of a three-Member Board is disqualified or recused from participating on the merits of a case. The Board also noted that OLC's opinion does not distinguish between cases that were pending at the time of the delegation of authority by the three-member Board and cases that are submitted to the Board after the delegation and the departure of the third member.

The Board acknowledged that it is bound by OLC's opinion, but that the opinion does not require the Board to take the action taken today. Instead, OLC's opinion stands for the proposition that the Board has the authority to issue two-member decisions and orders, but that it is within the Board's discretion whether or not to exercise that authority. In the current circumstances, the Board has decided to exercise its discretion to continue to function with its full powers as a two-member quorum of a three-member group designated by the Board.

These delegations will be effective as of midnight December 28, 2007, and shall be revoked when the Board returns to at least three Members following the adjournment of the 1st Session of the 110th Congress. All existing delegations of authority to the General Counsel and to staff in effect prior to the date of this order remain in full force and effect.

WILMA B. LIEBMAN, MEMBER

PETER C. SCHAUMBER, MEMBER

PETER N. KIRSANOW, MEMBER

DENNIS P. WALSH, MEMBER

RESPONDENT'S BRIEF

No. 08-1457

In the Supreme Court of the United States

NEW PROCESS STEEL, L.P., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

RUTH E. BURDICK
Attorney
National Labor Relations Board
Washington, D.C. 20570

ELENA KAGAN
Solicitor General
Counsel of Record

NEAL KUMAR KATYAL
Deputy Solicitor General

SARAH E. HARRINGTON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two current members.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 11
Argument:
Congress authorized the NLRB to operate with a two-member quorum of a three-member group to which the Board previously delegated its full powers ... 13
A. The plain language of Section 3(b) demonstrates that the Board can operate in these circumstances 14
B. The history of the Wagner Act and the legislative history of the Taft-Hartley Act confirm that Section 3(b)'s two-member group quorum requirement operates as an exception to the three-member Board quorum requirement 23
C. Congress's decision to permit the Board to delegate its authority to a three-member group that may take action with a two-member quorum is consistent with background principles governing the operation of government agencies 27
D. The Board's determination is entitled to deference 32
E. The policy arguments petitioner and its amici advance in support of their view are incorrect and irrelevant 35
Conclusion 41
Appendix A — Quorum requirements (Mar. 4, 2003) 1a
Appendix B — Statutory provisions involved 10a

TABLE OF AUTHORITIES

Cases: Page

American Directional Boring, Inc., 353 N.L.R.B. No. 21, 2008 WL 4490058 (Sept. 30, 2008), application for enforcement pending, No. 09-1194 (8th Cir. filed Jan. 26, 2009) 7

Assure Competitive Transp., Inc. v. *United States*, 629 F.2d 467 (7th Cir. 1980), cert. denied, 449 U.S. 1124 (1981) 29, 36

Bentonite Performance Minerals, LLC, 353 N.L.R.B. No. 75, 2008 WL 5427720 (Dec. 31, 2008), petition for review pending, No. 09-60034 (5th Cir. argued Feb. 1, 2010) 7

Board of Governors of the Fed. Reserve Sys. v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986) 32

Bricklayers, Local No. 5-N.J., 337 N.L.R.B. 168 (2001) 21

Cable Car Advertisers, Inc., 336 N.L.R.B. 927 (2001), enforced, 53 Fed. Appx. 467 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003) 21

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 32

de Vera v. *Blaz*, 851 F.2d 294 (9th Cir. 1988) 20

Donovan v. *National Bank*, 696 F.2d 678 (9th Cir. 1983) 28

Donovan v. *Spadea*, 757 F.2d 74 (3d Cir. 1985) 28

Eagle Ray Elec., 354 N.L.R.B. No. 27, 2009 WL 1569255 (May 29, 2009), petition for review pending, No. 09-1164 (D.C. Cir. filed June 12, 2009) 7

Ethan Michael, Inc. v. *Union Twp.*, 108 Fed. Appx. 43 (3d Cir. 2004) 20

Cases—Continued: Page

Extendicare Homes, Inc., 345 N.L.R.B. 905 (2005) 5
Falcon Trading Group, Ltd. v. *SEC*, 102 F.3d 579 (D.C. Cir. 1996) 31
FTC v. *Flotill Prods., Inc.*, 389 U.S. 179 (1967) 28, 29
Garner v. *Teamsters Local Union No. 776*, 346 U.S. 485 (1953) 2
G. Heileman Brewing Co., 290 N.L.R.B. 991 (1988), enforced, 879 F.2d 1526 (7th Cir. 1989) 21
G.H. Bass Caribbean, Inc., 306 N.L.R.B. 823 (1992) 39
Hartford Head Start Agency, Inc., 354 N.L.R.B. No. 15, 2009 WL 1311466 (Apr. 30, 2009), application for enforcement pending, No. 09-1741 (6th Cir. filed June 8, 2009) 7
Hibbs v. *Wynn*, 542 U.S. 88 (2004) 17
Holloway v. *United States*, 526 U.S. 1 (1999) 14
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) ... 14
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) 32
Laborers Int'l Union, Local Union 578, 352 N.L.R.B. 1005 (2008), petition for review pending, No. 08-9564 (10th Cir. argued Sept. 23, 2009) 7
Laborers' Int'l Union, Local Union No. 169, 352 N.L.R.B. 33 (2008), enforced, 337 Fed. Appx. 646 (9th Cir. 2009) 7
Lamie v. *United States Trustee*, 540 U.S. 526 (2004) 23
Laurel Baye Healthcare of Lake Lanier, Inc. v. *NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009) . 11, 15, 27

Cases—Continued: Page

Local 17B of the Graphic Commc'ns Conference, 353 N.L.R.B. No. 4, 2008 WL 4490042 (Sept. 12, 2008) 7

Local 155, Int'l Union, UAW, 352 N.L.R.B. 1122 (2008) 7

McDonnell Douglas Corp., 324 N.L.R.B. 1202 (1997) ... 21

Michigan Dep't of Transp. v. *ICC*, 698 F.2d 277 (6th Cir. 1983) 29

NLRB v. *Fansteel Mettallurgical Corp.*, 306 U.S. 240 (1939) 2

Narricot Indus., L.P. v. *NLRB*, 587 F.3d 654 (4th Cir. 2009) 11, 16, 17, 18, 19

Nicholson v. *ICC*, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984) 20, 31

Northeastern Land Servs. Ltd. v. *NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009) 11, 17

Pacific Bell Tel. Co., 344 N.L.R.B. 243 (2005) 21

Perrin v. *United States*, 444 U.S. 37 (1979) 16

Photo-Sonics, Inc. v. *NLRB*, 678 F.2d 121 (9th Cir. 1982) 21

Progressive Elec., Inc., 344 N.L.R.B. 426 (2005), enforced, 453 F.3d 538 (D.C. Cir. 2006) 39

Republic of Iraq v. *Beaty*, 129 S. Ct. 2183 (2009) 28

Runyon v. *McCrary*, 427 U.S. 160 (1976) 39

SFO Good-Nite Inn, LLC, 352 N.L.R.B. 268 (2008), petition for review pending, No. 08-1148 (D.C. Cir. argued Apr. 16, 2009) 7

Sabri v. *United States*, 541 U.S. 600 (2004) 39

Cases—Continued: Page

Saigon Gourmet Rest., Inc., 353 N.L.R.B. No. 110, 2009 WL 616703 (Mar. 9, 2009) 7

Siemens Bldg. Techs., Inc., 345 N.L.R.B. 1108 (2005) ... 39

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 33

Snell Island SNF LLC, 352 N.L.R.B. No. 106, 2008 WL 2962651 (July 18, 2008), enforced, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009) 7

Snell Island SNF LLC v. *NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009) 11, 23, 32, 34

Southern Bell Tel. & Tel. Co., 35 N.L.R.B. 621 (1941), set aside *sub nom. Southern Ass'n of Bell Tel. Employees* v. *NLRB*, 129 F.2d 410 (5th Cir. 1942), rev'd *sub nom. NLRB* v. *Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943) 24

Teamsters Local Union No. 523 v. *NLRB*, 590 F.3d 849 (10th Cir. 2009) 11, 32

TVA v. *Hill*, 437 U.S. 153 (1978) 36

United Food & Commercial Workers Union, Local 4, 353 N.L.R.B. No. 47, 2008 WL 4774553 (Oct. 31, 2008), application for enforcement pending, No. 09-70922 (9th Cir. filed Mar. 30, 2009) 7

United States v. *Turkette*, 452 U.S. 576 (1981) 14

United States v. *Wyder*, 674 F.2d 224 (4th Cir.), cert. denied, 457 U.S. 1125 (1982) 28

Wayneview Care Ctr., 352 N.L.R.B. 1089 (2008), petition for review pending, No. 08-1307 (D.C. Cir. filed Sept. 19, 2008) 7

Wisconsin Bell, Inc., 346 N.L.R.B. 62 (2005) 21

Statutes and regulations: Page

Communications Act of 1934, ch. 652, §§ 4-5, 48 Stat. 1066 30
Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 202(a), 122 Stat. 3039 30
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 823(c) 29
Government in the Sunshine Act, 5 U.S.C. 552b 38
Higher Education Opportunity Act, Pub. L. No. 110-315, § 497, 122 Stat. 3328 (to be codified at 20 U.S.C. 1099c-1(b)(8) (Supp. II 2008)) 18
Labor Relations Management Act, 1947, ch. 120, sec. 101, 61 Stat. 136:
§ 3(a), 61 Stat. 139 ..... 3, 25
§ 3(b), 61 Stat. 139 ..... 4, 25
National Labor Relations Act, ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*) 2
29 U.S.C. 153 ..... 2, 10a
29 U.S.C. 153(a) (§ 3(a)) 3, 4
29 U.S.C. 153(b) (Supp. I 1935) (§ 3(b), 49 Stat. 451) 3, 4, 24
29 U.S.C. 153(b) (§ 3(b)) ..... *passim*
29 U.S.C. 153(d) (§ 3(d)) 5
29 U.S.C. 154 2
29 U.S.C. 158 2
29 U.S.C. 158(a)(1) (§ 8(a)(1)) 8
29 U.S.C. 158(a)(5) (§ 8(a)(5)) 8
29 U.S.C. 159 2
29 U.S.C. 160 2

Statutes and regulations—Continued: Page

29 U.S.C. 160(e) (§ 10(e)) 6
29 U.S.C. 160(f) (§ 10(f)) 6
29 U.S.C. 160(j) (§ 10(j)) 6
Transportation Act of 1940, ch. 722, § 12, 54 Stat. 913-914 31
2 U.S.C. 437c(c) 30
15 U.S.C. 2053 30
18 U.S.C. 208 21
42 U.S.C. 4954(a) 18
5 C.F.R. 2635.101 *et seq.* 21
16 C.F.R. 4.14(b) 32
17 C.F.R. 200.41 31
Proclamation No. 4064, 85 Stat. 916 18

Miscellaneous:

Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (2000) 21
93 Cong. Rec. 7525 (1947) 26
155 Cong. Rec.:
p. S7332 (daily ed. July 9, 2009) 6
p. S14141 (daily ed. Dec. 24, 2009) 6
156 Cong. Rec. S59 (daily ed. Jan. 20, 2010) 6
Fletcher Cyclopedia of the Law of Corporations (2006) 28
H.R. 3020, 80th Cong., 1st Sess. (1947) 24
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess (1947) 25

Miscellaneous—Continued: Page

H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) 24

Susan J. McGolrick:

Board's Case Inventory Not Ballooning Despite Three Vacancies Since December 2007, Daily Labor Rep. (BNA) No. 122 at A-9 (June 25, 2008) 40

Two-Member NLRB Continues Past Two-Year Point, Will Get Supreme Court Review, Daily Labor Rep. (BNA) No. 10 at S-11 (Jan. 19. 2010) 40

Unprecedented Board Action Allows Just Two Members to Issue Decisions, Daily Labor Rep. (BNA) No. 166 at A-1 (Aug. 29, 2005) 5

"We're Poised for Changes" in Labor Law, Chairman Liebman Says at ABA Conference, Daily Labor Rep. (BNA) No. 216 at C-3 (Nov. 12, 2009) 6

National Labor Relations Board:

Board Members Since 1935 (visited Feb. 1, 2010) <http://www.nlrb.gov/about_us/overview/board/board_members_since_1935.aspx> 5, 24

Legislative History of the Labor Management Relations Act, 1947 (1948) 24, 25, 34, 37

Press Release No. R-2653, Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart (Dec. 28, 2007) <http://www.nlrb.gov/shared_files/Press%20Releases/2007/R-2653.pdf> 6

Miscellaneous—Continued: Page

Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937 (1938) 3

Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942 (1943) 3

Sixth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1941 (1942) 3

Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948 (1949) 4

1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 100th Cong., 2d Sess. (1988) 4

Office of Legal Counsel, U.S. Dep't of Justice, *Quorum Requirements*, 2003 WL 24166831 (Mar. 4, 2003) 4, 1a

Restatement (Third) of Agency (2006) 28

Robert's Rules of Order (1970) 36

S. 1126, 80th Cong., 1st Sess. (1947) 25

S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 25, 34, 37

Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Labor-Management Relations* (Comm. Print 1948) 4

Webster's New International Dictionary of the English Language (2d ed. 1945) 16, 19

In the Supreme Court of the United States

No. 08-1457

NEW PROCESS STEEL, L.P., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 564 F.3d 840. The decisions and orders of the National Labor Relations Board (Pet. App. 26-71, 72-81) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. A petition for writ of certiorari was filed on May 22, 2009, and was granted on November 2, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(b) of the National Labor Relations Act provides in pertinent part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. * * * A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. 153(b).

STATEMENT

1. In enacting the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, Congress sought through "the promotion of industrial peace to remove obstructions to the free flow of commerce." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939). To that end, the NLRA establishes mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress, as part of its design to fulfill the vital goals of the NLRA, "confide[d] primary interpretation and application of its rules [governing labor relations] to a specific and specially constituted tribunal"—the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted in 1935, the Board comprised three members.

National Labor Relations Act (National Labor Relations Act or Wagner Act), ch. 372, § 3(a), 49 Stat. 451 ("There is hereby created a board to be known as the 'National Labor Relations Board' * * *, which shall be composed of three members."). The original vacancy and quorum provisions of Section 3(b) of the Act provided: "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." § 3(b), 49 Stat. 451.[1]

In 1947, Congress enacted the Taft-Hartley Act, which enlarged the Board's unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board's size from three to five members. See Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 3(a), 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," and amended the quorum requirements to provide that "three members of the Board shall, at all

---

[1] Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 22, 1936; August 27 until November 25, 1940; and August 28 until October 10, 1941. See *Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937*, at 7 (1937); *Sixth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1941*, at 7 n.1 (1942); *Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942*, at 8 n.1 (1943). Those two-member Boards issued three published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published decisions in 1940 (reported at 27 N.L.R.B. 1-1395 and 28 N.L.R.B. 1-115); and 225 published decisions in 1941 (reported at 35 N.L.R.B. 24-1360 and 36 N.L.R.B. 1-45).

times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation]." Sec. 101, § 3(b), 61 Stat. 139. Since 1947, three-member groups constituted pursuant to the Board's Section 3(b) delegation authority have issued the overwhelming majority of the Board's decisions.[2] The current version of Subsections 3(a) and 3(b) of the Act and the 1935 version of Subsections 3(a) and 3(b) of the Act are reprinted in Appendix B, *infra*.

2. In 2002, following a brief period during which the Board was reduced to two members, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, U.S. Dep't of Justice, *Quorum Requirements*, 2003 WL 24166831, at *1 (Mar. 4, 2003), *reprinted in* App., *infra*, 1a. Prior to that request, the Board had not issued decisions in the short periods after 1947 when it had only two sitting members.[3] The OLC opinion concluded that, under Sec-

---

[2] See *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, at 7, 9 (1949); Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Labor-Management Relations* 6 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, an attachment to the prepared statement of the NLRB Chairman).

[3] As noted at note 1, *supra*, when composed of only three members (between 1935 and 1947), the Board routinely issued decisions with only two members sitting. After Congress increased the size of the Board in 1947, the Board's membership did not fall to two until late 1993 (November 26, 1993, through January 24, 1994). In addition to that

tion 3(b), if the Board, at a time when it had at least three members, "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." App., *infra*, 3a.[4]

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. Effective December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.[5] Pet. Br. Add. 4a-7a (Minute

---

two-month interval, the Board had only two members for approximately one month beginning in late 2001 (December 20, 2001, through January 22, 2002). See NLRB, *Board Members Since 1935* (visited Feb. 1, 2010) <http://www.nlrb.gov/about_us/overview/board/board_members_since_1935.aspx> (*Board Members Since 1935*).

[4] The Board first relied on the OLC opinion on August 26, 2005, at a time when the Board had three sitting members. The Board delegated to itself as a three-member group all of the Board's powers in anticipation of the expiration of Member Schaumber's term on August 27, 2005. See Susan J. McGolrick, *Unprecedented Board Action Allows Just Two Members to Issue Decisions*, Daily Labor Rep. (BNA) No. 166 at A-1 (Aug. 29, 2005). Member Schaumber received a recess appointment to the Board on August 31, see *Board Members Since 1935*, but in the few days prior (August 28 through August 31), the two sitting members, acting as a two-member quorum of the delegee group, issued a few unpublished orders and one published ruling on a procedural motion. See *Extendicare Homes, Inc.*, 345 N.L.R.B. 905 (2005). None of the Board's rulings issued during that time was challenged on the ground that it was issued by a two-member quorum of the group.

[5] By its terms, the delegation "shall be revoked when the Board returns to at least three [m]embers." Pet. Br. Add. 7a. Also effective that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-

of Board Action (Dec. 20, 2007)). After the recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the Board had delegated to the three-member group.[6]

Since January 1, 2008, that two-member quorum has issued over 500 decisions.[7] Those decisions resolved a wide variety of disputes over union representation and allegations of unfair labor practices, including cases involving employers' discharges of employees for exercis-

---

compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Subsections 10(e), (f) and (j) of the NLRA, 29 U.S.C. 160(e), (f) and (j). See Pet. Br. Add. 4a-5a; NLRB, *Press Release No. R-2653, Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007) <http://www.nlrb.gov/shared_files/Press%20Releases/2007/ R-2653.pdf>.

[6] On July 9, 2009, the Senate received the President's nominations of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009). On December 24, 2009, the Senate returned the Becker nomination to the President but held over the remaining nominations to the next session of Congress. *Id.* at S14141 (daily ed. Dec. 24, 2009). On January 20, 2010, the Senate received the President's renewed nomination of Becker. *Id.* at S59 (daily ed. Jan. 20, 2010).

[7] On November 12, 2009, it was reported that the two-member quorum had issued approximately 538 decisions, published and unpublished, and that the two-member quorum's authority had been challenged in approximately 77 cases pending in the courts of appeals. See Susan J. McGolrick, *"We're Poised for Changes" in Labor Law, Chairman Liebman Says at ABA Conference*, Daily Labor Rep. (BNA) No. 216 at C-3 (Nov. 12, 2009). The published decisions and summary judgment rulings are or will be reported and listed in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), 354 N.L.R.B. (129 decisions), and 355 N.L.R.B. (nine decisions as of January 29, 2010).

ing their statutory rights[8]; disputes over secret ballot elections in which employees voted to select a union representative[9]; protests over employers' withdrawal of recognition from union representatives designated by employees[10]; refusals by employers or unions to honor their obligation to bargain in good faith[11]; and challenges to the requirement that employees pay union dues as a condition of employment.[12]

---

[8] See, *e.g.*, *Saigon Gourmet Rest., Inc.*, 353 N.L.R.B. No. 110, 2009 WL 616703 (Mar. 9, 2009); *American Directional Boring, Inc.*, 353 N.L.R.B. No. 21 (Sept. 30, 2008), application for enforcement pending, No. 09-1194 (8th Cir. filed Jan. 26, 2009).

[9] See, *e.g.*, *Eagle Ray Elec. Co.*, 354 N.L.R.B. No. 27, 2009 WL 1569255 (May 29, 2009), petition for review pending, No. 09-1164 (D.C. Cir. filed June 12, 2009); *Snell Island SNF LLC*, 352 N.L.R.B. No. 106, 2008 WL 2962651 (July 18, 2008), enforced, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009).

[10] See, *e.g.*, *Bentonite Performance Minerals, LLC*, 353 N.L.R.B. No. 75, 2008 WL 5427720 (Dec. 31, 2008), petition for review pending, No. 09-60034 (5th Cir. argued Feb. 1, 2010); *SFO Good-Nite Inn, LLC*, 352 N.L.R.B. 268 (2008), petition for review pending, No. 08-1148 (D.C. Cir. argued Apr. 16, 2009).

[11] See, *e.g.*, *Hartford Head Start Agency, Inc.*, 354 N.L.R.B. No. 15, 2009 WL 1311466 (Apr. 30, 2009), application for enforcement pending, No. 09-1741 (6th Cir. filed June 8, 2009); *Local 17B of the Graphic Commc'ns Conference*, 353 N.L.R.B. No. 4, 2008 WL 4490042 (Sept. 12, 2008); *Local 155, Int'l Union, UAW*, 352 N.L.R.B. 1122 (2008); *Wayneview Care Ctr.*, 352 N.L.R.B. 1089 (2008), petition for review pending, No. 08-1307 (D.C. Cir. filed Sept. 19, 2008); *Laborers' Int'l Union, Local Union No. 169*, 352 N.L.R.B. 33 (2008), enforced, 337 Fed. Appx. 646 (9th Cir. 2009).

[12] See *e.g.*, *United Food & Commercial Workers Union, Local 4*, 353 N.L.R.B. No. 47, 2008 WL 4774553 (Oct. 31, 2008), application for enforcement pending, No. 09-70922 (9th Cir. filed Mar. 30, 2009); *Laborers Int'l Union, Local Union 578*, 352 N.L.R.B. 1005 (2008), petition for review pending, No. 08-9564 (10th Cir. argued Sept. 23, 2009).

3. Petitioner New Process Steel operates four steel processing plants in the United States and one in Mexico. Pet. App. 2. In September 2006, petitioner commenced negotiating a collective-bargaining agreement with the International Association of Machinists and Aerospace Workers, AFL-CIO (Union), which was certified as the exclusive bargaining representative for employees at petitioner's plant in Butler, Indiana. *Id.* at 2-3. After extensive negotiations, representatives of petitioner and the Union reached a tentative agreement. *Id.* at 3. The Union ratified the agreement according to its procedures, and petitioner's representatives then executed it. *Id.* at 5-6. But after petitioner subsequently received some employee complaints about the ratification procedure the Union used for the agreement, petitioner withdrew its recognition of the Union. *Id.* at 6.

The Union filed an unfair labor practice charge with the NLRB on September 17, 2007. Pet. App. 6. In December 2007, the Board's General Counsel filed a complaint alleging that petitioner had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by wrongfully repudiating a valid collective-bargaining agreement. Pet. App. 6-7, 30. After holding a hearing, an administrative law judge (ALJ) issued a decision in May 2008, finding that petitioner violated the Act as alleged. *Id.* at 7, 26. Later that month, the General Counsel issued a second complaint alleging that petitioner further violated its duty to bargain by withdrawing recognition of the Union during the term of a binding contract. *Id.* at 73. The General Counsel filed with the Board a motion for summary judgment on the second complaint in July 2008, based on petitioner's admission that it had withdrawn recognition. *Id.* at 73-74.

The Board issued decisions resolving both complaints in September 2008. In the first decision, the Board adopted the ALJ's finding that petitioner violated the Act by repudiating the collective-bargaining agreement, and ordered petitioner to adhere to the contract, to restore and give retroactive effect to its terms, and to make the employees whole for their resulting losses. Pet. App. 26-27, 67-69. In its second decision, the Board granted the General Counsel's motion for summary judgment and ordered petitioner to cease and desist from its unlawful withdrawal of recognition during the term of the contract, and to recognize and bargain with the Union. *Id.* at 72-80.

4. Petitioner filed petitions for review of the Board's orders in the United States Court of Appeals for the Seventh Circuit. The Board cross-applied for enforcement of the orders, and the court of appeals consolidated the cases. Pet. App. 7. Petitioner challenged the authority of the two-member quorum of the delegee group to issue the decisions and orders and also disputed the substance of the Board's unfair labor practice findings. *Id.* at 17-18. The court of appeals granted the Board's cross-applications for enforcement and denied petitioner's petitions for review. *Id.* at 1-25.

Petitioner argued that the delegation clause of Section 3(b) prohibited the Board from delegating its power to a group of three members when the Board knew that the term of one of the three was about to expire. The upshot of petitioner's view, the court noted, was that "the first sentence of § 3(b) restricts the Board from acting when its membership falls below three." Pet. App. 10. The court rejected that position, concluding that the plain language of Section 3(b) provides that the Board may act where, as here, the Board "delegated its

full powers to a group of three Board members" and two of those members remain as a quorum. *Ibid.* The court reasoned:

> As we read it, [Section] 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the [Board]'s delegation procedure.

Id. at 10-11 (footnote omitted).

The court further explained that, contrary to petitioner's contention, that reading of Section 3(b) does not deprive its first sentence of meaning. "The first sentence," the court reasoned, "establishes a requirement for delegation in the first instance, while the vacancy and quorum provisions allow the Board to proceed in the event that the terms of Board members subsequently expire." Pet. App. 10-11 n.2. By contrast, the court continued, petitioner's reading of Section 3(b) "appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two." *Id.* at 11 n.2.

The court of appeals further explained that its view of Section 3(b) was consistent with the legislative history of the Taft-Hartley Act, Pet. App. 13-15, and with quorum principles applicable to public boards in other circumstances, *id.* at 16-17.

On the merits, the court of appeals rejected petitioner's challenges to the Board's findings of unfair labor practices. Pet. App. 17-25.

5. Petitioners sought review in this Court and the Board agreed that the Court should grant the petition for a writ of certiorari in order to resolve this important question over which the courts of appeals are divided. Compare *Teamsters Local Union No. 523* v. *NLRB*, 590 F.3d 849, 850-852 (10th Cir. 2009); *Narricot Indus., L.P.* v. *NLRB*, 587 F.3d 654, 658-660 (4th Cir. 2009); *Snell Island SNF LLC* v. *NLRB*, 568 F.3d 410, 414-424 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); Pet. App. 8-17; *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F.3d 36, 40-42 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009), with *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 472-476 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009) (*Laurel Baye*).

SUMMARY OF ARGUMENT

Section 3(b) of the NLRA establishes several rules that govern the five-member NLRB's exercise of its authority. First, it authorizes the Board to delegate any or all of its powers to a group consisting of three members. Second, it establishes a general Board quorum provision, which requires the participation of at least three members in any action taken by the Board as a whole. Third, it includes a special group quorum provision that operates as an exception to the general three-member Board quorum rule. This special quorum provision permits a group to exercise the authority delegated to it by the Board when at least two members of the group are participating. By using the word "except" to yoke the

general and special group quorum provisions together, Congress provided that the ability of a delegee group to transact business is governed by the more specific, special group quorum provision. In insisting otherwise, petitioner ignores Section 3(b)'s inclusion of the word "except" and distorts the meaning and purpose of quorum requirements.

The legislative history of the NLRA confirms that the plain language of Section 3(b) means what it says—that it allows the two sitting Board members to operate as a two-member quorum of the three-member group to which a quorum of the Board delegated all of its powers. Congress amended the Act in 1947 by increasing the size of the Board from three to five members, by allowing the Board to delegate any or all of its powers to a group of three members, and by allowing such a delegee group to operate with a two-member quorum. In the 12 years preceding those amendments, the Board had routinely conducted business with a two-member quorum of the then-three-member Board. If Congress had intended to prevent the Board from continuing to operate through two members, it would have done so. Instead, it intentionally enhanced the Board's opportunities to operate through two members in order to increase the Board's efficiency.

Petitioner argues that the Board's act of delegation to the three-member group lapsed when the Board as a whole lost its quorum. But that reasoning is contrary to the general rule that the act of a government official or body continues in effect even after that official or body no longer has the authority to take action. Congress authorized a quorum of the full Board to delegate its powers to a group, and that delegation continues, as do

all of the Board's actions, even after the full Board has lost a quorum.

Finally, petitioner's repeated assertions about the wisdom of allowing the Board to operate with two members are irrelevant. This Court is called upon to determine what a statute authorizes, not whether that authorization is sound policy. And, in any event, Congress had good reason to give the NLRB the discretion (which it may or may not exercise) to continue operating in these circumstances. That authority enables the NLRB to continue to perform its statutory responsibilities even in the face of multiple vacancies.

ARGUMENT

CONGRESS AUTHORIZED THE NLRB TO OPERATE WITH A TWO-MEMBER QUORUM OF A THREE-MEMBER GROUP TO WHICH THE BOARD PREVIOUSLY DELEGATED ITS FULL POWERS

All the participants in this case agree that Congress has the constitutional authority to permit a quorum of the five-member NLRB to delegate all of its powers to a three-member group. All the participants further agree that, if Congress does permit such delegation to a three-member group, it also has the constitutional authority to permit two members of that group to exercise the delegated powers when they are the only two members remaining on the Board. The question presented in this case is whether Congress in fact exercised that authority. The plain text of Section 3(b) of the NLRA, 29 U.S.C. 153(b), as well as its history and context, demonstrate that Congress did so.

Congress authorized the Board to delegate "any or all of the powers which it may itself exercise" to a three-member group of the Board when it sees fit. 29 U.S.C.

153(b). The Board did that in December 2007, delegating all of its authority to a three-member group consisting of Members Liebman, Schaumber, and Kirsanow. Congress also—in plain statutory text—authorized a three-member group to exercise the authority delegated to it by the Board when it has a quorum of two members. That is exactly what Members Liebman and Schaumber have done for the last two years, following the expiration of Member Kirsanow's appointment. As the great majority of courts of appeals to have considered the issue have decided, Section 3(b) of the NLRA permits the Board to continue operating in these circumstances.

A. The Plain Language Of Section 3(b) Demonstrates That The Board Can Operate In These Circumstances

"As in any case of statutory construction, [the Court's] analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks and citation omitted). As this Court has noted, "the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette*, 452 U.S. 576, 593 (1981)). The plain language of Section 3(b) of the NLRA permits the NLRB to operate with only two sitting members if the Board, at a time when it had at least three members, previously delegated the Board's full authority to a three-member group that includes the two current members.

1. As relevant to this case, Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate "any or all of the powers which it may itself exercise" to a group of three or more Board members; (2) a declaration that a vacancy in the Board "shall not im-

pair" the authority of the remaining Board members to exercise the Board's powers; and (3) a provision stating that three members shall constitute a quorum of the Board, but with an express exception stating that two members shall constitute a quorum of any group designated pursuant to the Board's delegation authority. 29 U.S.C. 153(b).

The validity of the continuing action of the two current Board members follows from a straightforward reading of the pertinent statutory provisions. When the then-four-member Board delegated all of the Board's powers to a group of three Board members in December 2007, it did so pursuant to Section 3(b)'s delegation clause, the first clause identified above. When the term of one of the delegee group members (as well as that of the fourth sitting Board member) expired on December 31, 2007, the remaining two Board members constituted a quorum of the three-member group to which the Board had lawfully delegated its powers. Consistent with the second and third clauses identified above, those two members, whose authority was "not impair[ed]" by a vacancy in the other positions on the Board, 29 U.S.C. 153(b), continued to exercise the previously-delegated powers of the Board.

2. The central controversy in this case concerns the meaning of Section 3(b)'s quorum rule, which states that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the" delegation clause. 29 U.S.C. 153(b). Petitioner, relying on the reasoning of the United States Court of Appeals for the District of Columbia Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469 (2009), petition for cert. pending,

No. 09-377 (filed Sept. 29, 2009), argues (Pet. Br. 19-22) that the Board quorum provision (*i.e.*, the language preceding the express "except" clause) controls this case, and that, by including the phrase "at all times," Congress intended that both the Board and the delegee group have at least three members before either may act, regardless of whether the Board has previously delegated its authority to a three-member group. That interpretation is incorrect because it ignores Congress's decision to adopt a special group quorum provision, qualifying its general quorum rule with an express exception applicable to delegee groups that allows them to operate with two members.

The word "except" in Section 3(b) decides the question presented. "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The ordinary meaning of the word "except" is now and was in 1947: "[b]eing excepted or left out; with exception of; excepting." *Webster's New International Dictionary of the English Language* 608 (2d ed. 1945)) (*Webster*). Thus, the ordinary meaning of the quorum provision in Section 3(b) is that the special two-member quorum rule for a group to which the Board has delegated powers is an exception to the general three-member quorum rule for the full Board. See, *e.g.*, *Narricot Indus., L.P.* v. *NLRB*, 587 F.3d 654, 660 (4th Cir. 2009) (*Narricot*) ("statutory phrase 'except that' ordinarily introduces an exception").

The upshot of Section 3(b)'s text is the following: The full Board must have three or more participating members to take any action, including the delegation of any or all of its powers to a group of three members. That resulting delegee group in turn must have at least

two members to exercise the powers delegated to it. Which two members—or whether the third continues on the Board at all—is unimportant. Where, as here, a quorum of the full Board previously delegated all of the Board's powers to a three-member group, any two members of that group constitute a quorum that may continue to exercise the delegated powers, regardless whether the third group member participates in that exercise or continues to sit on the Board. The legality of such actions by the two-member quorum does not depend on whether a quorum remains in the full Board because the Board has already delegated all of its authority to the delegee group, which is authorized to act through a quorum of two members. See *Narricot*, 587 F.2d at 659; *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F.3d 36, 41 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009).

Although petitioner purports to apply the rule that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," Pet. Br. 18 (quoting *Hibbs* v. *Wynn*, 542 U.S. 88, 101 (2004)), petitioner in fact treats the statute as though it did not contain the word "except." Giving it less than its ordinary meaning, petitioner—relying on the D.C. Circuit's decision in *Laurel Baye*—opines that "the word 'except' is * * * present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value" than the larger Board's ability to act. Pet. Br. 21 (citation omitted). But Congress could have accomplished that result by leaving out the word "except" altogether and instead codifying two independent clauses or sentences, the first stating that "three members of the Board shall, at all times, constitute a quorum of the

Board," and the second stating that "two members shall constitute a quorum of any group designated pursuant to" the delegation clause. 29 U.S.C. 153(b); see *Narricot*, 587 F.3d at 659-660. Congress did not do that; instead, Congress yoked the two clauses with a comma and the word "except," signifying that the special quorum rule in the second clause is an exception to the general quorum rule in the first.

Nor is Congress's construction novel or ambiguous. On the contrary, Congress has used the construction "at all times * * * except" in a number of statutes to accomplish exactly what it did in Section 3(b)—to provide that a general rule should apply at all times *except* in the instances specified by Congress in the statute. See, *e.g.*, Higher Education Opportunity Act, Pub. L. No. 110-315, § 497, 122 Stat. 3328 (to be codified at 20 U.S.C. 1099c-1(b)(8) (Supp. II 2008)) (Secretary of Education shall "maintain and preserve *at all times* the confidentiality of any program review report * * * *except* that the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review") (emphases added).[13]

This reading is confirmed by the language Congress used after "except," in declaring that "two members shall constitute a quorum of *any* group designated pursuant to" the delegation clause. Congress did not create

[13] Accord 42 U.S.C. 4954(a) (full-time commitment of VISTA volunteer "shall include a commitment to live among and at the economic level of the people served * * * *at all times* during their periods of service, *except* for authorized periods of leave") (emphases added); cf. Proclamation No. 4064, 85 Stat. 916, 916 (4 U.S.C.A. 6 note) ("[T]he fifty flags of the United States of America displayed at the Washington Monument in the District of Columbia [are to] be flown *at all times* during the day and night, *except* when the weather is inclement.") (emphases added).

a two-member quorum provision for only some delegee groups: it created a single rule for all such groups. Whether or not the Board currently has three members is not an enumerated feature of that rule. To the contrary, Congress used broad language in the special group quorum provision to cover all groups exercising delegated powers.

3. In insisting that the general quorum provision overrides the special group exception, petitioner also fails to give the word "quorum" its ordinary and contemporary meaning. That meaning was (and is): "[s]uch a number of officers or members of any body or association as is competent by law or constitution to transact business." *Webster* 1394. The purpose of a quorum provision is to set the minimum participation level required before a body may act. Thus, Section 3(b)'s statement that two members constitute a quorum of a delegee group denotes that the group may legally transact business when two of its members are participating. Similarly, Section 3(b)'s statement that three members constitute a quorum of the Board denotes that the Board may legally transact business when three of its members are participating. Under petitioner's view of the law, however, the full Board quorum provision may disable a delegee group from acting, even though that group has the requisite two-member quorum. See *Narricot*, 587 F.3d at 660. That reading untethers the quorum requirement for the full Board from its purpose of establishing a *participation floor*. Under petitioner's interpretation, the full Board quorum rule in Section 3(b) more broadly establishes a *membership floor* that must be satisfied in order for any delegee group to act, even though the non-group member(s) of the full Board would not participate in the delegee group's action.

At the same time, petitioner's reading of Section 3(b) prevents the quorum requirements for the delegee group from having the effect quorum rules ordinarily do. Under petitioner's construction, a two-member quorum of a delegee group is never in itself sufficient to permit the group to transact business; there must also exist a third sitting member of the Board and the delegee group. But whether the Board and group have this third member has no bearing on whether the group has the quorum that makes it able to transact business. The purpose of the quorum provision is to ensure that at least two members of a delegee group actually participate in a decision; if they do, that should be the end of the matter. By definition, a two-member quorum provision enables a tribunal to dispose of a case by a unanimous two-person vote.[14]

In accordance with the usual meaning of a two-member quorum rule, two members of the Board's delegee groups have routinely issued opinions when the third sitting member cannot participate because, for example, of a conflict. Petitioner attempts to harmonize its position with this settled practice by asserting that, "[i]n those cases, the decision is still issued by all three members of the panel." Pet. Br. 22 n.9. But that assertion blinks reality and common sense; when one member of a group cannot participate in a case because of a conflict, that member *does not participate* in the making or

[14] In other contexts in which two members of a three-member body acted as a quorum for that body, federal courts have permitted the quorum to take action through a unanimous two-person vote. See, *e.g.*, *de Vera* v. *Blaz*, 851 F.2d 294, 296 (9th Cir. 1988); *Nicholson* v. *ICC*, 711 F.2d 364, 366 n.7 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984); see also *Ethan Michael, Inc.* v. *Union Twp.*, 108 Fed. Appx. 43, 45 (3d Cir. 2004).

issuing of that decision.[15] Rather, as the OLC opinion recognizes, such decisions are issued by a two-member quorum of the delegee group.[16] App., *infra*, 6a-8a; see *Photo-Sonics, Inc.* v. *NLRB*, 678 F.2d 121 (9th Cir. 1982)[17]; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1186-1187 (2000) (discussing cases holding that members of multi-member agencies who are disqualified from participating in a decision do not count towards the quorum).[18]

---

[15] Congress has declared it to be a crime for an officer or employee of the executive branch or of any independent agency of the United States to participate in a decision in which he or a member of his family has a financial interest. 18 U.S.C. 208; see 5 C.F.R. 2635.101 *et seq.*

[16] Petitioner is correct that, in such cases, the Board lists in each published decision the composition of the three-member group to which the case was assigned, but when one member is recused from the case, the Board also notes the member who is not participating "in the decision on the merits." *E.g.*, *Pacific Bell Tel. Co.*, 344 N.L.R.B. 243, 243 & n.1 (2005); *Bricklayers, Local #5 N.J.*, 337 N.L.R.B. 168, 168 & n.4 (2001); *Cable Car Advertisers, Inc.*, 336 N.L.R.B. 927, 927 & n.1 (2001), enforced, 53 Fed. Appx. 467 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003); *McDonnell Douglas Corp.*, 324 N.L.R.B. 1202, 1202 & n.4 (1997); *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 991 & n.1 (1988), enforced, 879 F.2d 1526 (7th Cir. 1989). The provision of this information may serve a variety of interests, including disclosing to the public the composition of the original group to which a case was assigned, as well as the identity of the recusing member.

[17] Petitioner erroneously describes (Pet. Br. 9-10) as "dictum" the Ninth Circuit's holding in *Photo-Sonics* that a decision made by a two-member quorum of a delegee group was valid, 678 F.2d at 122-123.

[18] Petitioner cites (Br. 22 n.9) *Wisconsin Bell, Inc.*, 346 N.L.R.B. 62 (2005), a case in which the then-three-member Board, departing from its practice, reached a decision with the participation of only two members without first delegating the power to decide the case to a three-member group. Because of the absence of a delegation, that decision

Petitioner suggests a further misunderstanding of the purpose of a quorum rule in contending that "[t]he natural meaning" of the clause governing the quorum requirement is that "the fully constituted five-member Board may decide a case if three members *agree*" (Pet. Br. 20 (emphasis added)). But the requirement that three members agree to an action when all five members participate in a decision is a function of the majority-rule principle that governs multimember bodies. It has nothing to do with the general Board quorum requirement, which has force only when fewer than five Board members participate in a decision. Under the general Board quorum requirement, the Board may transact business with the participation of only three members. In such a situation, the principle of majority rule would require that at least two of the participating members agree on any particular decision or course of action, but does not require unanimity among the three members.

4. Finally, petitioner misconstrues Section 3(b)'s vacancy provision, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." 29 U.S.C. 153(b). Petitioner contends (Pet. Br. 13, 19-20) that this provision has no application to a delegee group because it refers to the "Board" rather than to a "group." But petitioner fails to acknowledge that every member of a delegee group is necessarily a member of the Board. Thus, the first reference to "Board"—"[a] vacancy in the Board"—must include a vacancy in a delegee group because any vacancy in such a group is by definition also a vacancy in the Board. The second reference to "Board"—"shall not impair the right of the

was subject to the general Board quorum requirement and is therefore not relevant to the issue in this case.

remaining members to exercise all of the powers of the Board"—applies equally to a delegee group to which "all of the powers of the Board" have been delegated. Thus, the vacancy clause establishes that there is no minimum membership level required of either the full Board or a delegee group before the Board or group may exercise its authority, as long as the Board or group complies with the relevant three- or two-member participation requirement in the relevant quorum provision.[19]

B. The History Of The Wagner Act And The Legislative History Of The Taft-Hartley Act Confirm That Section 3(b)'s Two-Member Group Quorum Requirement Operates As An Exception To The Three-Member Board Quorum Requirement

Because Section 3(b)'s language is clear, there is no need to consult its history. See, *e.g.*, *Lamie* v. *United States Trustee*, 540 U.S. 526, 539 (2004). Nevertheless, that history confirms the plain meaning of the statutory text: that a two-member quorum of a three-member group to which the Board has legally delegated all of its

---

[19] Amicus Michigan Regional Council of Carpenters (MRCC) argues (Amicus Br. 4-5) that the Board's delegation of authority to the three-member group consisting of Members Liebman, Schaumber, and Kirsanow was illegal from the start because the Board knew at the time that Member Kirsanow's term would soon expire, leaving the delegee group with only two members. But the anticipated departure of one member of a group has no bearing on the legality of the delegation at a time when the full Board had a quorum and the delegee group included three members. See *Snell Island SNF LLC* v. *NLRB*, 568 F.3d 410, 419 (2d Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009). In any case, petitioner did not challenge the validity of the Board's initial delegation to the three-member group in either its petition for a writ of certiorari or its brief as petitioner; amici may not assert that challenge in petitioner's stead.

powers may continue to operate when those two members are the only sitting members of the Board.

As discussed at pp. 2-3, *supra*, the Wagner Act originally created a three-member Board, two members of which could—and did—act as a quorum. Wagner Act § 3(a) and (b), 49 Stat. 451. Between the creation of the Board in 1935 and Congress's amendment of the NLRA through the Taft-Hartley Act in 1947, the three-member Board routinely issued decisions with only two sitting members. See, *e.g.*, *Southern Bell Tel. & Tel. Co.*, 35 N.L.R.B. 621 (1941) (issued on Sept. 23, 1941, when Board had only two members, see *Board Members Since 1935*, *supra* note 3, at 5), set aside *sub nom. Southern Ass'n of Bell Tel. Employees* v. *NLRB*, 129 F.2d 410 (5th Cir. 1942), rev'd *sub nom. NLRB* v. *Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943).

Although petitioner impugns the practice of ever allowing two Board members to decide a case (see Pet. Br. 25-27, 32-35), Congress showed no concern about that regular practice when it considered the Taft-Hartley amendments. Indeed, the bill originally introduced in the House would have maintained a three-member Board and continued to allow two of the three members to exercise all of the Board's powers. See H.R. 3020, 80th Cong., 1st Sess. § 3 (1947) (as passed by House), *reprinted in* NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 171-172 (1948) (*1947 Leg. Hist.*); H.R. Rep. No. 245, 80th Cong., 1st Sess. 6 (1947), *reprinted in 1947 Leg. Hist.* 297.

The bill proposed in the Senate similarly showed comfort with the Board's acting through two members. Although that bill would have enlarged the Board to seven members and set the full Board quorum at four members, it also proposed to preserve the ability of the

Board, even at that larger size, to exercise its powers through a two-member quorum by authorizing the Board to delegate "any or all" of its powers "to any group of three or more members," two members of which would constitute a quorum. S. 1126, 80th Cong., 1st Sess. § 3 (1947) (as reported by Senate comm.), *reprinted in 1947 Leg. Hist.* 106-107. In proposing to expand the size of the Board, the Senate Committee on Labor expressed concern that the Board was taking too long to decide cases. Explaining that "[t]here is no field in which time is more important," the Committee sought to increase the Board from three to seven members in order to "permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage." S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947) (*Senate Report*), *reprinted in 1947 Leg. Hist.* 414. The Senate Committee contemplated that those panels, along with other delegee groups, could act with a two-member quorum (just as for 12 years the three-member Board had done) to increase the Board's flexibility and speed.

When the Conference Committee reconciled the competing bills, it agreed, as a compromise between the House and Senate, to expand the Board from three to five members. Taft-Hartley Act, sec. 101, § 3(a), 61 Stat. 139, *reprinted in 1947 Leg. Hist.* 4; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36-37 (1947) (*Conference Report*), *reprinted in 1947 Leg. Hist.* 540-541. In addition, it retained the Senate's delegation and two-member quorum provisions, see Taft-Hartley Act, Sec. 101, § 3(b), 61 Stat. 139, *reprinted in 1947 Leg. Hist.* 4; *Conference Report* 37, *reprinted in 1947 Leg. Hist.* 541, thereby preserving the Board's ability to act through two members even as the size of the full Board expanded.

The history of the 1947 changes to the Board's composition and delegation authority thus confirms what is plain in the text of Section 3(b). That history shows that Congress wanted the Board to operate more efficiently and, to advance this objective, it authorized the Board to delegate any or all of its powers to a three-member group, which in turn could exercise those powers through a two-member quorum.[20] Through that authorization, Congress enabled the Board to continue its prior practice of allowing two members to exercise its powers. Indeed, the change Congress made only increased the Board's ability to use two-member quorums to advance its mission. Had Congress been dissatisfied with the Board's practice of operating through two-member quorums, it could have eliminated the Board's authority to do so when amending the statute. Instead, Congress preserved the Board's authority to act through a two-member quorum whenever the Board exercised its delegation authority.

[20] As amicus Chamber of Commerce (CoC) points out (at 7-8), at least one member of Congress explicitly stated—albeit as a criticism of the 1947 amendments—that the amended version of Section 3(b) "not only authorizes the Board to delegate its powers, but authorizes the Board to delegate its powers, and all of them, to less than a quorum of the Board." 93 Cong. Rec. 7525 (1947) (statement of Sen. O'Mahoney), *reprinted in 1947 Leg. Hist.* 1632. Although the view of one member of the Senate by no means binds this Court in interpreting a statute, Senator O'Mahoney's view is perfectly consistent with the Board's view of the plain meaning of the text that his chamber codified in Section 3(b).

C. Congress's Decision To Permit The Board To Delegate Its Authority To A Three-Member Group That May Take Action With A Two-Member Quorum Is Consistent With Background Principles Governing The Operation Of Government Agencies

In enacting legislation authorizing federal agencies to carry out their assigned duties, Congress is free, within the bounds of its enumerated powers, to dictate the manner in which such agencies will function. Section 3(b), by its terms, authorizes the two current members of the NLRB to exercise all of the powers that the Board delegated to the group of which they are members. Generic "background legal principles" cannot supplant the meaning of this specific text. In any event, as the court below found, Section 3(b)'s special group quorum provision is fully consistent with the background rules governing the operation of government agencies.

Petitioner urges this Court to interpret Section 3(b) —indeed, to override its plain language—by borrowing selected common law rules governing private corporations and private agency relationships. Those rules, petitioner contends, would dictate that, at the moment the authority of the Board as a whole expired (*i.e.*, when the Board lost its three-member quorum), the Board's prior delegation of authority to the group also lapsed. See Pet. Br. 23-27; see also *Laurel Baye*, 564 F.3d at 473 (asserting that an agent's delegated authority "terminates when the powers belonging to the entity that bestowed the authority are suspended"). But the rules on which petitioner relies do not govern the continuing validity of lawful government actions.

When a governmental entity such as the Board takes an action, that action—whether a regulation, order, or delegation—acquires the force of law in its own right.

There is no basis in Section 3(b) for concluding that such an action is deprived of its legal force and effect if the full Board thereafter loses its quorum. Cf. *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2194-2195 (2009) (noting that the "expiration of the *authorities* * * * is not the same as cancellation of the *effect* of the President's prior valid exercise of those authorities"). Given that the Board made a valid delegation to a three-member group, the Board's subsequent loss of a quorum did not abrogate the legal effect of that delegation, any more than the loss of a quorum abrogated the effect of the Board's other prior actions and decisions. In this respect, Section 3(b) is in harmony with the general principle that "[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office." *United States* v. *Wyder*, 674 F.2d 224, 227 (4th Cir.), cert. denied, 457 U.S. 1125 (1982); accord *Donovan* v. *Spadea*, 757 F.2d 74, 77 (3d Cir. 1985); *Donovan* v. *National Bank*, 696 F.2d 678, 682-683 (9th Cir. 1983).[21]

---

[21] Petitioner errs in assuming that Congress intends the common law rules applicable to private corporations and agency relationships to serve as default rules for public entities. As the Court noted in *FTC* v. *Flotill Products, Inc.*, 389 U.S. 179 (1967) (*Flotill*), when an agency's enabling statute is silent on the matter, quorum rules governing federal agencies are derived from the common law of *public* bodies. *Id.* at 183-184 & n.6 (collecting cases). Indeed, even the agency and corporations treatises on which petitioner relies note that governmental bodies are often subject to special rules not applicable to private bodies. See *Fletcher Cyclopedia of the Law of Corporations* § 2, at 6 (2006) (distinguishing between private and municipal corporations, stating that "the law of municipal corporations [is] its own unique topic," and concluding that "[a]ccordingly, this treatise does not cover municipal corporations"); Restatement (Third) of Agency 6 (2006) (noting in its introduction that it "deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions

In any case, background common law rules cannot override the clear intent of Congress, as expressed in statutory text. See *FTC* v. *Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967).[22] Petitioner's discussion (Pet. Br. 28-32) of four federal agencies that ceased acting when they did not have enough members to constitute a quorum in fact illustrates this principle, rather than advancing petitioner's own argument. Those agencies—the Federal Election Commission, the Consumer Product Safety Commission, the Federal Mine Safety and Health Review Commission, and the Occupational Safety and Health Review Commission—ceased acting when their membership fell below the quorum specified in each agency's governing statute.[23] But that supports the

---

and entities created by government"). Moreover, when a delegee group possessed of all of the Board's powers acts, it is acting as the Board, not as an agent of the Board.

[22] If background common law rules governing public bodies were relevant in this case, the applicable quorum rule would be that "a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body." *Flotill*, 389 U.S. at 183 & n.6; cf. *Assure Competitive Transp., Inc.* v. *United States*, 629 F.2d 467, 472-473 (7th Cir. 1980) (holding valid a decision of the Interstate Commerce Commission (ICC) issued by four members at a time when only six of the ICC's 11 seats were filled because the four members were a majority of those in office and therefore constituted a quorum), cert. denied, 449 U.S. 1124 (1981); *Michigan Dep't of Transp.* v. *ICC*, 698 F.2d 277, 279 (6th Cir. 1983) (upholding as valid a decision of the ICC issued by four members when the other seven Commission seats were vacant).

[23] Petitioner quotes (Br. 30) a report from the Federal Mine Safety and Health Review Commission stating that it lacked a decisionmaking quorum for most of fiscal year 2003, during which time it had only two of five members. Although the Federal Mine Safety and Health Act contains a provision authorizing the commission to delegate any or all of its powers to a group of three, two of whom would constitute a quorum (30 U.S.C. 823(c)), the Commission had not delegated its powers to such a group before it was reduced to two members.

Board's basic point in this case: it is up to Congress to establish participation and membership rules for agencies, which need not be one-size-fits-all, and it is incumbent on each agency to act in accordance with the particular rules Congress has specified. The Federal Election Commission, for example, was not able to act when it had only two of six commissioners because that agency's authorizing legislation includes what Section 3(b) does not—a membership rule requiring "the affirmative vote of 4 members of the Commission" in order to act. 2 U.S.C. 437c(c). The Consumer Product Safety Commission operates under a different set of rules: although generally needing three out of five members to act, 15 U.S.C. 2053, it may, as petitioner concedes (Pet. Br. 30 n.15), conduct business for limited periods with a quorum of only two members. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 202(a), 122 Stat. 3039. And, in the case of the NLRB, Congress established still other rules, which authorized the Board to delegate its authority to a three-member group and authorized such a group to act with a quorum of two members.

Nor was the delegation-quorum scheme Congress established through adoption of the Taft-Hartley amendments in 1947 unprecedented. At that time, the statute governing the operation of the Federal Communications Commission provided that four of the seven members constituted a quorum, but authorized the commission to assign any of its work to divisions of at least three members, a majority of whom could decide matters with the same force and effect as could the commission. See Communications Act of 1934, ch. 652, §§ 4-5, 48 Stat. 1066. Similarly, the statute governing the Interstate Commerce Commission (ICC) at that time pro-

vided that a "majority of the Commission" (then nine members) constituted a quorum, but authorized the commission to delegate any of its work to divisions consisting of no fewer than three members, a majority of whom constituted a quorum. See Transportation Act of 1940, ch. 722, § 12, 54 Stat. 913-914; *Nicholson* v. *ICC*, 711 F.2d 364, 366 n.7 (D.C. Cir. 1983) (holding that an ICC decision in which only two of the three commissioners in a division participated was validly issued by a quorum of the assigned division), cert. denied, 464 U.S. 1056 (1984).

Congress has also permitted some federal agencies to establish and amend their own quorum requirements, and at least two agencies have exercised that authority in order to continue operating when more than half of their seats are vacant. For example, the Securities and Exchange Commission (SEC), whose enabling statute does not include a quorum provision, adopted its own quorum requirements in 1995 when faced with the prospect of having three out of five seats vacant. The rule adopted by the SEC provides that three members of the Commission shall constitute a quorum unless the number of sitting commissioners is fewer than three, in which case "a quorum shall consist of the number of members in office." 17 C.F.R. 200.41; see *Falcon Trading Group, Ltd.* v. *SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996) (upholding the SEC's quorum provisions and action taken under those provisions by two sitting members). The Federal Trade Commission has also amended its quorum provision, changing from a rule defining a quorum as a majority of all the members of the Commission to a rule defining a quorum as "[a] majority of the members of the Commission in office and not

recused from participating in the matter." 16 C.F.R. 4.14(b).

Thus, there is nothing unusual or unprecedented about Congress's decision to authorize the NLRB to delegate powers to a group, a quorum of which may exercise those powers even when a majority of the Board's seats are vacant.

D. The Board's Determination Is Entitled To Deference

Two of the six courts of appeals that have considered the issue presented here have determined that the Board's interpretation of Section 3(b) is entitled to the deference this Court accords under its decision in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *Teamsters Local Union No. 523* v. *NLRB*, 590 F.3d 849, 850-852 (10th Cir. 2009); *Snell Island SNF LLC* v. *NLRB*, 568 F.3d 410, 419-424 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009) (*Snell Island*). There is no need for the Court to decide this question because Section 3(b) unambiguously authorizes the Board to continue operating with two sitting members when a quorum of the full Board delegated its authority to a three-member group including the two current members. See, *e.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Board of Governors of the Federal Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). To the extent, however, that this Court views the language in Section 3(b) as susceptible to more than one construction, the Court should defer to the Board's understanding of that provision.

Snell Island and *Teamsters* found deference under this Court's decision in *Chevron* appropriate because Congress vested in the Board the authority to interpret and enforce the NLRA. In delegating its powers to the

three-member group that includes the two current members, the Board expressed its view that those members would continue to "issue decisions and orders in unfair labor practice and representation cases." Pet. Br. Add. 5a. The Board based that view on "the statutory language" of Section 3(b) as well as the OLC opinion confirming that interpretation. *Ibid.* At the very least, the judgment of the Board as to the meaning of the statute it enforces is entitled to the kind of judicial deference owed to agency actions having persuasive authority. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

In this case, the Board exercised care and deliberation in formulating its view that Section 3(b) authorizes it to continue operating with two members of a group to which all of the Board's powers had been delegated. The Board refrained from acting on its interpretation of the delegation and quorum provisions in Section 3(b) until an independent opinion from the Office of Legal Counsel confirmed that interpretation.[24] After receiving that

[24] The Board agreed to be bound by OLC's interpretation of the statute when it requested OLC's opinion. See App., *infra*, 1a. After OLC issued its opinion, the Board noted that its interpretation was the same as the one that the Board had historically used. See Pet. Br. Add. 5a-6a (Minute of Board Action delegating authority to three-member group in anticipation of the Board's losing two members, noting that OLC's opinion is based on "essentially the same theory that the Board has historically used in situations where one member of a three-Member Board is disqualified or recused from participating on the merits of a case"). And the Board further explained that the OLC

opinion, the Board again considered the question and determined to act based on its interpretation of Section 3(b)'s text and its agreement with OLC's conclusion. Pet. Br. Add. 5a-6a. In so doing, the Board made clear that it was making the delegation to enable the two current members "to continue to function with its full powers as a two-member quorum of a three-member group designated by the Board." *Id.* at 6a; see *id.* at 4a ("The Board anticipates that in the near future it may for a temporary period have fewer than three Members of its statutorily-prescribed full complement of five Members."). And the Board further explained that its decision to delegate accorded with its "continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible." *Ibid.*

The Board's considered construction of its authority is consistent not only with the text of the statute, but also with the legislative history of the NLRA's quorum provisions, the construction of comparable statutes authorizing decisions by two-member quorums, and the overall purpose of the NLRA to promote labor peace and the free flow of commerce. See pp. 13-26, *supra*; *Senate Report* 8 ("There is no field in which time is more important."), *reprinted in 1947 Leg. Hist.* 414; see also *Snell Island*, 568 F.3d at 424 (commending the Board for its "conscientious efforts to stay 'open for business'"). The Board's interpretation of Section 3(b) is therefore entitled to this Court's deference.

---

opinion merely permitted, and did not require, such a delegation: "[T]he opinion does not require the Board to take the action taken today. Instead, OLC's opinion stands for the proposition that the Board has the authority to issue two-member decisions and orders, but that it is within the Board's discretion whether or not to exercise that authority." Pet. Br. Add. 6a.

E. The Policy Arguments Petitioner And Its Amici Advance In Support Of Their View Are Incorrect And Irrelevant

Petitioner and its amici argue at length that this Court should interpret Section 3(b) to bar the Board from continuing to operate in the circumstances currently presented because "Congress would not in the first instance have created a board or commission with adjudicatory powers affecting private adverse parties, consisting of an even number of members." Pet. Br. 25; see *id.* at 25-27, 34; see also CoC Amicus Br. 15-20; MRCC Amicus Br. 14-20. That argument is mistaken.

1. As an initial matter, petitioner's argument (Pet. Br. 25) ignores the actual choice Congress made in enacting the Taft-Hartley amendments. Congress of course did not "in the first instance * * * create[] a board * * * with adjudicatory powers affecting private adverse parties, consisting of an even number of members."[25] *Ibid.* Congress instead established a Board consisting of five members. But Congress also created a mechanism enabling the Board to operate with only two members if the Board (when it has at least three members) lawfully exercises its discretion to delegate. That mechanism, specifically contemplating two-member quorums, represents Congress's judgment "in the first instance" of when the Board should "consist[] of an even number of members."

Moreover, petitioner's attack on the soundness of Congress's policy choice is irrelevant to the question

[25] Although petitioner suggests (Pet. Br. 25) that boards and commissions with an even number of members are presumptively suspect, it does not challenge the validity of the NLRB to act when it has four members. Indeed, petitioner specifically concedes (*id.* at 21) that the Board may exercise its authority when it has "three or four or five members."

presented—namely, what Congress authorized in Section 3(b). As this Court has noted:

> [The Court's] individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned * * *, the judicial process comes to an end. [The Court] do[es] not sit as a committee of review, nor [is the Court] vested with the power of veto.

TVA v. *Hill*, 437 U.S. 153, 194-195 (1978). Congress provided in Section 3(b) that (1) the Board have discretion to delegate all of its powers to a group of three members and that (2) such a group have authority to exercise those powers when it has a quorum of at least two members. There is no cause for this Court to inquire into the wisdom of that clear decision.

2. In any event, the reasonableness of Congress's choice in crafting Section 3(b) as it did is apparent. Statutory quorum provisions do not express a legislature's judgment about the optimal number of decisionmakers; rather, they define the minimum number of participants needed to protect "against totally unrepresentative action in the name of the body by an unduly small number of persons.'" *Assure Competitive Transp., Inc.* v. *United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting *Robert's Rules of Order* § 3, at 16 (1970)), cert. denied, 449 U.S. 1124 (1981). So, in enacting Section 3(b), Congress was not opining on whether the Board generally should operate with an even or an odd number of members. On the contrary, Congress was deciding whether, in the circumstance of multiple vacancies, it should permit two members to exercise the Board's au-

thority or force the Board to shut down entirely. In expanding the size of the Board in 1947, Congress expressed its view of the importance of resolving labor disputes as expeditiously as possible. See *Senate Report* 8, *reprinted in 1947 Leg. Hist.* 414. Congress thus made a reasonable decision to permit the Board to operate in the face of three vacancies when a quorum of the full Board thinks such action is appropriate.

Significantly, Congress did not *require* the Board to continue to operate with only two members. Rather, Congress granted to the full Board the discretion to vest "any or all of the powers which it may itself exercise" in a three-member group, two members of which could exercise those powers as a quorum. There may be circumstances in which Board members whose terms or appointments are expiring will decline to exercise the authority to delegate that Section 3(b) provides. Congress vested that discretion in the Board itself, to exercise or not as the members see fit.

For example, the full Board may take into account the composition of any two-member quorum before deciding to delegate any of its powers. As petitioner notes (Pet. Br. 34), the Board now customarily consists of three members from the President's political party and two members from the opposing party. If foreseen departures from the Board would leave the Board with two members who belong to the same party, the other members might decide not to make any delegation. In the instant case, the two current members belong to different political parties; the two other members whose terms expired at the end of 2007 thought it better to allow the Board to continue operating with those members than to require the Board to shut down altogether. The Board also could have imposed, ex ante, a time-limit

on its delegation of authority, specifying that the delegation would expire on a date certain, rather than when the Board returned to "at least three Members." Pet. Br. Add. 7a. Whether, in any given case, the Board has made the best decision is not relevant to the question at hand. Congress reasonably decided, in enacting Section 3(b), to leave those judgments to the Board's discretion.[26]

Petitioner casts aspersions on the validity of the decisions the Board has issued in the last two years, suggesting (Pet. Br. 34-35) that the decisions were made without "meaningful debate" and "full deliberation." In

[26] Petitioner relies (Pet. Br. 5-6, 32 n.16) on statements of two prior Board members expressing the view that, during a prior period in which the Board's membership fell to two, the Board did not have a quorum to act. But those members were simply stating the effects of the general quorum rule; they were not expressing a view about the permissibility of two members' acting after a delegation. Offering his own view as a former Board member (MRCC Amicus Br. 12 n.6), counsel of record for amicus Michigan Regional Council of Carpenters states his recollection that, when the Board membership fell to two in late 1993, the remaining members did not believe they had authority to act. But once again, that is so because a quorum of the full Board had not previously delegated all of its powers to a group that included those two members. The Board cannot *always* act with only two members; in order to do so, there must be a valid delegation in place, as there was in December 2007. In any case, the personal views or recollections of a small number of former Board members cannot override the meaning of the relevant statute.

Also unavailing is amicus counsel's assertion (MRCC Amicus Br. at 13) that the current Board is not operating in compliance with the requirements of the Government in the Sunshine Act (Sunshine Act), 5 U.S.C. 552b. He offers no support in the record or other authority for his view, and the current Solicitor of the Board confirms that amicus counsel is incorrect as a factual matter in asserting that the Board does not view meetings of the two current members to resolve cases as subject to the Sunshine Act.

particular, petitioner notes (*id.* at 35) that each of the current members has signed on to opinions applying prior Board precedents with which the member may not agree. But an adjudicator's decision to apply an existing precedent with which he or she disagrees in the absence of a sufficient majority to override the precedent—or in a variety of other circumstances—hardly counts as illegitimate. Board members also followed that practice when the Board had three, four, or even five members. See, *e.g. Siemens Bldg. Techs., Inc.*, 345 N.L.R.B. 1108, 1108 n.5 (2005); *Progressive Elec., Inc.*, 344 N.L.R.B. 426, 426 n.2 (2005), enforced, 453 F.3d 538 (D.C. Cir. 2006); *Randell Warehouse of Arizona, Inc.*, 330 N.L.R.B. 914, 914 n.2 (2000); *G.H. Bass Caribbean, Inc.*, 306 N.L.R.B. 823, 823 & nn.1-2 (1992). Indeed, members of this Court have made the same kind of choice. See, *e.g.*, *Sabri* v. *United States*, 541 U.S. 600, 611 (2004) (Thomas, J., concurring in the judgment) ("[U]ntil this Court reconsiders its precedents, and because neither party requests us to do so here, our prior case law controls the outcome of this case."); *Runyon* v. *McCrary*, 427 U.S. 160, 189 (1976) (Stevens, J., concurring) ("For me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided."). Some might view the actions of the Board's current members that petitioner decries as models of the responsible and restrained exercise of governmental authority.[27]

[27] As petitioner points out (Br. 33), when the term of one member of a delegee group expires, the Board has generally opted to reconstitute the delegee group rather than issue decisions from the remaining two members. But the Board's practice of reconstituting a delegee group when that is an option does not create a requirement to that effect when no such rule appears in the statute.

Moreover, the current Board has refrained from deciding cases raising new issues when the two members do not agree on their proper resolution. See Susan J. McGolrick, *Two-Member NLRB Continues Past Two-Year Point, Will Get Supreme Court Review*, Daily Labor Rep. (BNA) No. 10 at S-11 (Jan. 19, 2010); Susan J. McGolrick, *Board's Case Inventory Not Ballooning Despite Three Vacancies Since December 2007*, Daily Labor Rep. (BNA) No. 122 at A-9 (June 25, 2008). In so doing, the current members are preserving such issues for a more complete Board to consider and decide. A delay in resolving that limited class of cases is preferable—at any rate, Congress and the full Board could have thought—to a delay in deciding all the cases that have come before the Board in the last 25 months.

3. Petitioner admits (Pet. Br. 36-37) that Congress may enable the Board to exercise its authority when it has three vacancies. But that is exactly what Congress did in 1947 when it amended Section 3(b) of the NLRA to include both the delegation and the group quorum provisions, and Congress should not have to replay that decision. If, during the two years in which the Board has operated with only two members, Congress had changed its mind about the wisdom of the scheme it put in place in 1947, Congress could have amended Section 3(b) to reflect its new position. Congress did not do that, nor did it in any other way express displeasure with the Board's approach. This case is therefore governed by the existing provisions in Section 3(b), which allow the two current Board members to exercise the Board's powers as a two-member quorum of a group to which the Board delegated all of its powers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

NEAL KUMAR KATYAL
Deputy Solicitor General

SARAH E. HARRINGTON
Assistant to the Solicitor General

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

DAVID HABENSTREIT
Assistant General Counsel

RUTH E. BURDICK
Attorney
National Labor Relations Board

FEBRUARY 2010

APPENDIX A

OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

Mar. 4, 2003

QUORUM REQUIREMENTS

The National Labor Relations Board may issue decisions even when only two of its five seats are filled, if the Board, at a time when it has at least three members, delegates all its powers to a three-member group and the two remaining members are part of this group and both participate in the decisions.

Memorandum Opinion for the Solicitor
National Labor Relations Board

Your office has asked for our opinion whether, having delegated all of its powers to a group of three members, the National Labor Relations Board ("Board") may issue decisions and orders in unfair labor practice and representation cases once three of the five seats on the Board have become vacant.[1] We believe that the Board may issue such decisions and orders if the two remaining

---

[1] Letter for Jay Bybee, Assistant Attorney General, Office of Legal Counsel, from Henry S. Breiteneicher, Acting Solicitor, National Labor Relations Board, *Re: Request for OLC Opinion* (May 16, 2002) ("Board Letter"). In accordance with our Office's policies, the Board has agreed to be bound by the present opinion. *Id.* at 7.

members are part of the three-member group to which the Board delegated all of its powers and if they both participate in such decisions and orders.

I.

The Board consists of five members, who are appointed by the President with the advice and consent of the Senate and serve staggered terms of five years. 29 U.S.C. § 153(a) (2000). The Board may "delegate to any group of three or more members any or all of the powers which it may itself exercise." *Id.* § 153(b). Although a "vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board," the Board is subject to quorum requirements: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to" the provision on delegation to groups of three or more members. *Id.*

The "primary function of the Board is to adjudicate any contested issues that arise in . . . unfair labor practice and representation cases, i.e. to issue final decisions and orders in the cases, usually after an initial or recommended decision has been issued by an administrative law judge (in unfair labor practice cases), or by a hearing officer or regional director (in representation cases)." Board Letter at 3-4 (footnotes omitted); *see* 29 U.S.C. §§ 158, 159 (2000). As a matter of prudence, when the membership on the Board has fallen to two members, the Board has not issued decisions and orders in such cases. Board Letter at 2. The Board has not attempted to resolve whether a Board with three serving members could delegate its powers to itself as a three-member group and, when the membership of the

Board and of the group fell to two, continue to issue decisions and orders on the theory that a quorum of two for the three-member group would remain. *See id.* at 2-3.[2]

II.

In our view, if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.

A.

The statute permits the Board to "delegate to any group of three . . . members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b). In the proposed arrangement, the three remaining members of the Board would constitute themselves a "group" of the Board and would delegate to that group "all of the [Board's] powers." The statute further declares that, where the Board has delegated power to a group of three or more members, a quorum of the group shall be two members. *Id.* The provision for a two-member quorum of such a group is an express exception to the requirement that a quorum of the Board shall be three members: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group desig-

[2] The Board Letter might be read to leave open the possibility that the last two members, even without a delegation from three members, could act as a group with a two-member quorum. Because only "[t]he Board is authorized to delegate to any group of three or more members any or all of [its] powers" and "three members of the Board shall, at all times, constitute a quorum of the Board," 29 U.S.C. § 153(b), it is unclear how the remaining two members could take action in those circumstances.

nated" by the Board. *Id.* Moreover, the statute states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise *all* of the powers of the Board." *Id.* (emphasis added).[3] We therefore conclude that the plain terms of section 153(b) provide that the Board could form a "group" that could exercise all of the Board's powers as long as it had a quorum of two members.

There is judicial authority for reading this statute to mean that the departure of one member of a three-member group designated by the Board would not prevent the remaining two members from acting. In *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), the Ninth Circuit upheld the decision of a three-member group when one member's resignation had become effective on the day that the group's decision had been issued. The court ruled that even if the resignation precluded the member from taking part in the decision, "a decision by two members of the panel would still be binding." *Id.* at 122. The court relied specifically on section 153(b)'s provision that two members of a group to which the Board has delegated powers shall constitute a quorum. *Id.* (referring to section 153(b) as section 3(b) of the National Labor Relations Act). In defining the term "quorum," the court drew an analogy to cases where courts having three members

---

[3] In the construction of an Act of Congress, "unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1 (2000). Thus, the provision under which "[a] vacancy in the Board shall not impair the right of the remaining members," 29 U.S.C. 153(b), also applies to more than one vacancy, as long as the quorum requirement is met. *Cf. Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (interpreting term "vacancies").

"have issued decisions by a quorum of two judges when the third died or was ill." *Id.* (citations omitted). In these cases, "[c]ourts have interpreted 'quorum' to mean the 'number of the members of the court as may legally transact judicial business.'" *Id.* (quoting *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953)). Applying the analogy to the Board, the Ninth Circuit held that "[u]nder the view that 'quorum' means the number of members that may legally transact business, the Board's decision in this case is valid . . . because a 'quorum' of two panel members supported the decision." *Id.* The resignation of one member thus did not take away the remaining members' power to act.

We note that the legislative history of the statute, though far from exact on this point, is consistent with the view that delegations to groups of members may be used to ensure the Board's capacity to accomplish its business—a capacity that would otherwise be destroyed in the circumstances you have posited. The provision on delegations to groups of three or more members was first enacted in 1947 as part of the Taft-Hartley Act. The bill, as passed by the House, provided for a Board of three members—the same number as under prior law. *See* 93 Cong. Rec. 3549 (1947). The Senate bill called for expanding the Board to seven members, of whom four would be a quorum, and allowing delegation to any group of three members, of whom two would be a quorum. *See* S. Rep. No. 80-105, at 33 (1947). The purpose of this arrangement was to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage, and to leave the remaining member, not presently assigned to either panel, to deal with the problems of

administration[,] personnel, expenditures, and the preparation of the budget." *Id.* at 8. The conference committee, without giving any reasons, settled on a Board of five members, but retained the provisions for delegations to groups of three. H.R. Conf. Rep. No. 80-510, at 37 (1947). The intent thus seems to have been generally to enable the Board to handle more cases by dividing itself into panels. As the District of Columbia Circuit declared in a case upholding the National Mediation Board's delegation of its authority to a single member expected to remain in office, "it would seem that if the [National Mediation] Board can use its authority to delegate in order to operate more efficiently, then *a fortiori* the Board can use its authority in order to continue to operate when it otherwise would be disabled." *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1340 n.26 (D.C. Cir. 1983) ("*Yardmasters*"). [4]

B.

We recognize that, here, the Board would be creating a three-member "group" with the intent that it operate as a two-member group upon the departure of the third member. In *Photo-Sonics*, where the Ninth Circuit up-

---

[4] *But cf. Hunter v. National Mediation Board*, 754 F.2d 1496, 1498 n.1 (9th Cir. 1985) (because the final administrative action in the case was taken by a quorum of the NMB, the court does not "reach the question of the limits of NMB authority to delegate powers in the event of . . . vacancies" and "adopt[s] the rationale of *Yardmasters* only insofar as necessary for [the] conclusion that interim actions by [the single Board member] did not affect the ultimate validity" of the NMB's action); *Scheduled Skyways, Inc. v. National Mediation Board*, 738 F.2d 339, 341 (8th Cir.) (the "question of one-member certification" had become moot, and the court did not reach the issue), *appeal dismissed*, 746 F.2d 456 (1984).

held the decision of a group whose membership had fallen to two, the Board evidently had not created the three-member group with the intent that it function with only two members, and there appears even to have been a dispute whether in fact only two members of the group had participated in the decision. 678 F.2d at 122. Furthermore, in *Photo-Sonics*, the Board as a whole continued to have four members, even after one member of the "group" resigned. *See* 254 Decisions and Orders of the National Labor Relations Board, at III (1982). Here, the Board itself would lack its quorum of three members, and the proposed arrangement would be designed with the purpose of dealing with that situation.

Nevertheless, the statute provides that once a delegation is made to a group of three or more members, the quorum of the group becomes two. It imposes no requirement that the group continue to have three members, as long as the two-member quorum continues. Furthermore, even if the three-member quorum of the Board as a whole no longer exists, a prior delegation of the Board would remain valid, because a vacancy in the position of a delegating authority does not invalidate prior delegations of institutional power by that authority. *See, e.g., Yardmasters*, 721 F.2d at 1343; *Champaign County v. United States Law Enforcement Assistance Administration*, 611 F.2d 1200, 1207 (7th Cir. 1979); *but see Yardmasters*, 721 F.2d at 1346-47 (Wald, J., dissenting). In addition, when the Board's membership has fallen to three members, the Board has developed a practice of designating those members as a "group" in cases where one member will be disqualified, and then proceeding to a decision with a quorum of the two members able to participate. Board Letter at 5-6.

This practice suggests that three-member groups may be constituted even when it is foreseen that only two members will actually participate in a decision.

We also recognize that our conclusion arguably is in tension with dictum in *Yardmasters*. There, a divided panel of the District of Columbia Circuit held that a single member of the National Mediation Board ("NMB"), acting under a delegation, could exercise the powers of that body when vacancies on the NMB temporarily had deprived it of its statutory quorum. The court ruled that the statutory provision allowing for delegation did not limit the powers that could be delegated; that the loss of a quorum on the NMB did not vitiate the delegation, because the statute provided that vacancies on the NMB would not affect the powers of the remaining members; and that the delegation did not conflict with the quorum requirement, because the statutory provision on delegation provided an independent mode for the NMB to conduct its business, apart from transacting business at NMB meetings. In answering the dissenting judge's argument that a single member could abuse the powers vested in the NMB, the court stressed that, "[u]nlike the National Labor Relations Board, the [NMB] is not principally engaged in substantive adjudications" and "does not adjudicate unfair labor practices or seek to enforce individual rights under [its governing statute]." 721 F.2d at 1345. The court might thus be understood to have disapproved of the use of delegations to deal with the lack of a quorum where an agency exercises the sort of substantive power that is vested in the Board. The court, however, did not analyze the statute applicable to the Board, and, under this statute, there is a separate *quorum* requirement for a three-member group. The

arrangement that would be used to deal with vacancies on the Board, therefore, would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum. The possible abuse of the delegation power that the dissenting judge raised in *Yardmasters*, and the majority sought to avoid, would not arise under the statute governing the Board.

M. EDWARD WHELAN III

Principal Deputy Assistant Attorney General
Office of Legal Counsel

APPENDIX B

1. 29 U.S.C. 153 provides in pertinent part:

National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section

159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

* * * * *

2. 29 U.S.C. 153 (Supp. I 1935) provides in pertinent part:

National Labor Relations Board; creation and composition; annual reports. (a) There is created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be compose of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each except that any

individual chosen to fill a vacancy shall be appointed for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

* * * * *

REPLY BRIEF

Supreme Court, U.S.
FILED
MAR 4 - 2010
OFFICE OF THE CLERK

No. 08-1457

In The Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER NEW PROCESS STEEL, L.P.

MARK E. SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG, LLP
2101 L St., N.W., Ste. 1000
Washington, DC 20037
Tel: (202) 331-3100

SHELDON E. RICHIE
Counsel of Record
RICHIE & GUERINGER, P.C.
100 Congress Ave., Ste. 1750
Austin, TX 78701
Tel: (512) 236-9220
srichie@rg-austin.com

JOSEPH W. AMBASH
JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
Tel: (617) 310-6091

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
I.	SUMMARY OF ARGUMENT	1
II.	ARGUMENT IN REPLY	2
	A. The Plain Statutory Language Is Not Compatible with a Two-Person Board	2
	B. The Common Law of Corporations and Agency Reinforces the Three-Member Quorum Requirement	7
	C. Legislative History Does Not Support the Board's Theory	9
	D. Deference Is Not Warranted	11
	E. No Collateral Makeweight Theory Relied on by the NLRB Justifies Decision-making by a Group of Fewer Than Three Members	12
III.	CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES:

Assure Competitive Transp., Inc. v. United States, 629 F.2d 467 (7th Cir. 1980) 13

Bryan v. United States, 524 U.S. 184 (1998) 10

Burlington N. & San Francisco Ry. Co. v. United States, No. 07-1601 (May 4, 2009).....6

FTC v. Flotill Prods., Inc., 389 U.S. 179 (1967) 7, 8

Hibbs v. Winn, 542 U.S. 88 (2004) 4

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 6

Kucana v. Holder, 588 U.S. ___, No. 08-911 (Jan. 20, 2010).....10

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) 7

Market Co. v. Hoffman, 101 U.S. 112 (1879) 4

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).....8

Newport v. Fact Concepts, Inc., 453 U.S. 247 (1981).....8

Penn. Public Welfare Dep't v. Davenport, 495 U.S. 552 (1990).....4

Perrin v. United States, 444 U.S. 37 (1979).....6

Rapanos v. United States, 547 U.S. 715 (2006).....10

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).....10

TABLE OF AUTHORITIES – Continued

Page

Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009) 12

United States v. Mead Corp., 533 U.S. 218 (2001) 11

STATUTES AND REGULATIONS:

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Section 3(b), 29 U.S.C. § 153(b) 3, 5, 6, 7, 15

Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136, 139 (1947), codified at 29 U.S.C. § 151 *et seq.* ..... *passim*

National Labor Relations Act (Wagner Act), 49 Stat. 452 (1935), codified at 29 U.S.C. § 153 (Supp. I 1935) 1, 13, 14, 15

I. SUMMARY OF ARGUMENT

The NLRB's justifications for an undersized two-member Board are at odds with every relevant principle of language, law, logic and policy.

The textual approach offered by the Board violates the critical rules of statutory construction. It makes the statutory mandate requiring a three-member quorum of the Board "at all times" inexplicable, if not superfluous, and accords no meaning to the obvious distinction in the statute between the "Board" and a "group." Standard rules of construction do not accommodate a functional two-member NLRB no matter how inconvenient it is for the Board.

The collateral sources of authority cited by the Board also provide no support. The Board notes that under the Wagner Act, for a short period, it operated with only two members. Wholly apart from whether this was deemed acceptable or desirable, it is irrelevant. The later Taft-Hartley amendments rejected this anomaly.

The Board's references to a general or common law of federal agency business, legislative history and deference are similarly unpersuasive. The legislative history cited is devoid of helpful information and mostly suggests that Congress would not have and did not approve a two-member Board. The notion that there is a federal common law of boards and agencies that supplants the common law of corporations and agency cited by New Process and the D.C. Circuit is unsupported by the authority noted. That authority

proves that Congress pays attention to the workings of boards and agencies and prescribes the rules that must apply in the text of enabling statutes. At bottom, the Board argues that this Court should apply the operating rules prescribed for different agencies if the NLRB's rules prove inadequate. There is no support anywhere for that argument.

The Board's newly hatched deference claim looks like a last resort. The Board did not request deference below and the request is not supported by any of the standard criteria for determining when deference is warranted.

Finally, the Board has no answer for the litigants whose decisions have been compromised by the lack of full and impartial consideration of their cases and who do not support the notion that an inadequately constituted Board is better as a matter of national labor policy than no Board at all. This is bad policy and a bad way of governing. The excuses offered to support the insufficient Board are not good enough to condone it.

The decision of the court of appeals should be reversed.

II. ARGUMENT IN REPLY

A. The Plain Statutory Language Is Not Compatible with a Two-Person Board

All of the parties and amici in this case claim that their interpretation is most obedient to the plain

language of section 3(b) of the NLRA, 29 U.S.C. § 153(b), and accords with the standard and accepted rules governing statutory construction. There is no disagreement over the rules of construction that apply, only on how they apply in this setting.

The NLRB contends that New Process overlooks the word "except" in its analysis and accordingly, petitioner's theory fails because the word "except" coming after the phrase, "three members of the Board shall, at all times, constitute a quorum of the Board," means that any three-member group constituted in accordance with the first sentence of section 3(b) really could be a two-member Board that does not require the third person otherwise mandated by the three-member Board clause. *See* NLRB Brief at 14-19.

This reading should not be preferred. First, it deletes the "at all times" phrase because that phrase is unnecessary to the meaning drawn by the Board. If the phrase is removed from the text, the interpretation suggested by the Board would be unchanged. The relevant passage would read:

> Three members of the Board shall constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

In the Board's formulation, the "at all times" clause is surplusage because it adds nothing to the predicate or antecedent words and has no apparent

influence on any word or phrase residing within the local commas or in the larger context. The Board offers no plausible explanation for the meaning or purpose of this clause. With or without it, three members of the Board will always constitute a quorum subject to the exception. With or without the clause, two members of the delegee group will always be sufficient for a quorum no matter how many people are on the Board. In the Board's analysis, the "at all times" clause neither adds nor subtracts meaning from any other word or phrase in the paragraph.

This manner of construction is not favored by this Court. *Penn. Public Welfare Dep't v. Davenport*, 495 U.S. 552, 562 (1990); *see also Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). *See also Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("The rule against superfluities complements the principle that courts are to interpret the words of a statute in context.").

Surplusage is entirely preventable here by acknowledging that with less than three members, there is no Board quorum and thus no power to act as

the NLRB. At the same time, only two members of the three-member group need to agree to transact business, but that allowance by no means eradicates the necessity of having a Board quorum in the first place "at all times."

Second, the petitioner's theory results in no loss of meaning with respect to the word "except." It does no damage to the meaning of any word or phrase in section 3(b) to construe the exception to refer only to the delegee group and to function so that a majority of two of the three-member group may carry out the adjudicative duties of the Board so long as there are at least three members to begin with who are participating in the process, thus giving a natural meaning to the "at all times" clause and recognizing the "exception" applicable to the group.

While the Board insists that petitioner's interpretation does violence to the word "except," it is not apparent how this happens or how the word becomes superfluous. Under New Process's interpretation, the "except" proviso performs the important function of introducing the proposition that a regular majority allows for decision-making by the three-member group if two of the three agree. In this analysis, no word is deprived of meaning and all of the words coexist harmoniously.

Third, the Board's theory fails to account for the separate meanings of "Board" and "group." The Board's theory glosses over the distinction between the two terms. If a "group" is just another word for

"Board," then much of section 3(b) is unnecessary. If Congress had intended Board and group to be synonymous, it would not have made sense to provide that "three members of the Board shall, at all times, constitute a quorum of the Board," while allowing for a two-member majority of a delegee group that can consist of only two members. Congress added the word "group" in Taft-Hartley and it must be presumed to have meaning.

It also makes nonsense of the vacancy clause. The vacancy clause does not by its words amend or alter the other specific requirements of section 3(b) and easily is read in harmony with them. There can be vacancies but not below the minimum requirements that are specified. Petitioner's linguistic analysis, but not the Board's, is reinforced by the vacancy clause which is applicable to the Board but not the group.[1] By implication, Congress's decision

---

[1] The Board argues that since members of a group must also be members of the Board, the vacancy provision validates the theory that a two-member group is all that is needed. NLRB Brief at 22. This approach again asks the Court to conclude that different words have the same meaning. There is no known rule of construction to validate this proposition. The general rule is that different words are accorded their ordinary and natural meaning in the context in which they are used. *See Burlington N. & San Francisco Ry. Co. v. United States*, No. 07-1601, slip op. at 10 (May 4, 2009); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context.").

not to apply the vacancy clause to the three-member group suggests that a vacancy in the group is not permitted, and that Congress was not confused and did not intend to eliminate an obvious distinction between the terms "Board" and "group."

The Board's overall theory is selective in its analysis, giving great power to favored words at the expense of others. It suggests an improbable level of confusion on the part of the drafters that is not supported under any normal principles of statutory construction.

The Board's theory breaks too many rules to be compelling. More than anything, it suggests a belief that the circumstances justify a looser textual analysis than the rules of construction usually allow. The D.C. Circuit correctly rejected this conclusion. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (Pet. App. 97) ("[W]e may not convolute a statutory scheme to avoid an inconvenient result.").

B. The Common Law of Corporations and Agency Reinforces the Three-Member Quorum Requirement

The Board protests the suggestion that common law principles of corporate and agency law inform the analysis of the language of section 3(b). Citing *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967), the Board argues that the common law principles cited by New Process and the D.C. Circuit in *Laurel Baye*

do not establish the correct default rules for governmental entities where a statute is silent on the meaning of a commonly understood word or phrase.

Flotill Products embodies no such general rule. It stands principally for the unremarkable notion that Congress has treated various Boards and agencies differently in their organic statutes in establishing quorum rules for conducting agency business and, as is the case in *Flotill Products*, may have acquiesced in any agency's previous adoption of a long-standing quorum rule without reference to possible common law meanings.

The decision does not in any sense preclude application of ordinary common law principles for conducting business or preclude their use as a default position in the case of statutory silence or ambiguity. If, as the Board argues, *Flotill Products* announces a special quorum rule for agencies to be applied generally in the absence of congressional direction, that rule is apparent neither in the text of the decision nor in the Board's brief here. There is literally no support for it.

In the face of statutory silence, there is a strong presumption that Congress intends the application of established principles of general and common law. This Court has not stated an exception to this rule for the conduct of federal agency business. *Newport v. Fact Concepts, Inc.*, 453 U.S. 247, 258 (1981) (requiring express intent to the contrary to justify a departure). *See also Nationwide Mut. Ins. Co. v.*

Darden, 503 U.S. 318, 326 (1992) (rejecting the theory that Congress's decision to change a common law concept in one statute carries over by implication to another). The D.C. Circuit committed no error in relying on common law rules and those rules continue to point toward a proper resolution in this case.

C. Legislative History Does Not Support the Board's Theory

The Board seeks to supplement its statutory analysis by pointing to arguably supportive legislative history generated in the process of enactment of Taft-Hartley. In particular, the Board argues:

> The history of the 1947 changes . . . confirms what is plain in the text of Section 3(b). That history shows that Congress wanted the Board to operate more efficiently and to advance this objective, it authorized the Board to delegate any or all of its powers to a three-member group, which in turn could exercise their powers through a two-member quorum.

NLRB Brief at 26 (footnote omitted).

The argument is circular and mostly begs the question, proving nothing about Congress's consent to a two-member Board.[2]

---

[2] The Board's reliance on advocacy in favor of a seven-member Board proposal that was not adopted adds nothing

(Continued on following page)

Conceding that greater efficiency was an objective of Congress in 1947, this generalized objective provides no insight that is relevant to this case. Whether or not Congress contemplated the prospect of three unfilled vacancies on the Board sixty years into the future, there is nothing obviously efficient about a two-member Board that cannot decide many of its cases because the two disagree, just as there is nothing inefficient in the expectation that appointments are made more expeditiously. Efficiency is a worthy objective, but even if a two-member Board could be considered an issue that is mainly about efficiency, "no law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 588 U.S. ___, slip op. at 17, No. 08-911 (Jan. 20, 2010), quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality opinion).

---

substantive to the discussion and like most advocacy in favor of unenacted amendments, it has no apparent value as an indication of specific congressional intent, even if it were directly on point. It is not on point, however, and not meaningful here. For the same reasons, the critical comments of Senator O'Mahoney (Brief for the NLRB at 26 n.20) are not persuasive authority of Congress's intent. *See Bryan v. United States*, 524 U.S. 184, 196 (1998), quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation.").

The legislative history of the Taft-Hartley Act neither supports the NLRB's preference for a two-member Board nor does it enlighten this Court's consideration of the issue.

D. Deference Is Not Warranted

Although the Board claimed no special deference for its views in the proceedings below, it now embraces the concept. And while the rationale supportive of a functional two-member Board was the work of a Deputy Assistant Attorney General of the Office of Legal Counsel, Department of Justice,[3] the Board now claims it as its own. There was no public process by which the OLC opinion or Board adoption of it was open for notice and comment. The question is purely a question of statutory interpretation calling on no agency expertise that may arguably be claimed by the NLRB. None of the considerations that support special deference or special respect are present in this case. *See United States v. Mead Corp.*, 533 U.S. 218, 227-28 & nn.7-10 (2001) (collecting authorities).

The claim for deference in this case appears for the first time in the Board's Response Brief. No deference is warranted. *See Mead*, 533 U.S. at 228 (deference claim entitled to "near indifference" when first advanced in an agency's brief). Its claim of deference is based mostly on a flawed construction of

---

[3] This position is not a Presidential appointment or subject to advice and consent confirmation by the Senate.

the statutory language, it relies on irrelevant legislative history and a circular rationale trying to make something out if it, and comes to rest at the end on the proposition that the Board had to do something "to stay 'open for business.'" Brief for the NLRB at 34, quoting *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 424 (2d Cir. 2009).

The NLRA contains no provision suggesting an intent to permit the NLRB to re-define quorum rules and overall, the Board's rationale for continuing to function as an undersized entity may be understandable but it has not earned deference or special respect from this Court.

E. No Collateral Makeweight Theory Relied on by the NLRB Justifies Decision-making By a Group of Fewer Than Three Members

The Board finally disputes that decision-making by a two-member group is bad policy. The Board argues that Congress has the ability to dictate the manner in which an agency functions. NLRB Brief at 27. No one disputes that Congress has that authority and has exercised it many times in directing the conduct of other agencies; however, the question raised in this case is whether Congress authorized a two-member Board to render decisions in the NLRA. The Board argues that the "participation and membership rules" established by Congress are controlling. No one disputes that either. The rest of the

Board's discussion either misses the point or is circular. The Board argues that Congress's "participation rules" authorize the NLRB to delegate the Board's powers to a group of three, and that a quorum of two may exercise those powers. NLRB Brief at 32. But the argument ignores that the "membership rule" requires that the Board have three members at all times and that a group have three members as well. Under the Board's current construction, a three-member group can contain a "phantom" member. That construction is inconsistent both with the language of the statute and common sense.

The Board's lengthy discourse into the soundness of decision-making by an even number of Board members similarly misses the point. Although the Board recognizes that membership rules protect "against totally unrepresentative action in the name of the body by an unduly small number of persons," the NLRB insists, with no support, that in the NLRA, Congress opted for decisions in the name of the Board to be made by an unduly small number of persons. NLRB Brief at 36, quoting *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980). According to the Board, Congress, as a matter of policy, preferred expedience over fullsome and healthy debate. If that is so, the source of the conclusion is not apparent. There is no support for this legislative choice in the words of the NLRA or the historical circumstances at the time of the enactment of the Taft-Hartley Act. The legislative history of the amendments to the Wagner Act suggest that

Congress's concern for expedience was manifest in expanding the size of the Board to permit the creation of multiple panels rather than to restrict the number of decision-makers. In all likelihood, Congress never contemplated the current partisan politics or congressional gridlock that has characterized the nomination process in recent years. It certainly was not the way it worked in 1947, when the Taft-Hartley Act was debated and passed.

The NLRB understandably defends the decisions made by two members of the Board in the last two years, analogizing the decision-making process of the two remaining Board members to decisions of this Court where a Justice issues an opinion concurring in the result but disagreeing with the controlling precedent. The analogy does not work. Decisions by the two remaining NLRB members have not been constrained by their belief that precedent controlled the outcome of the cases before them. Rather, their decisions reflect concurrence in an outcome solely in order to issue a decision whether or not they agree with it. They rely on "institutional reasons," not precedent, to justify the issuance of a decision in not just one or two isolated cases over a thirty-year period, but in multiple cases. This type of decision-making deprives the parties of the vigorous debate and full and fair consideration they deserve – and until January 2008, were provided.

The Board's reference to two-member decisions of the NLRB under the Wagner Act similarly is inapposite. As the Board acknowledges, those decisions

were consistent with the plain language of the statute at the time, which provided that the NLRB shall have three members, and "two members of the Board shall, at all times, constitute a quorum." 29 U.S.C. § 153 (Supp. I 1935). Taft-Hartley changed this provision.

In addition to expanding the size of the Board, increasing the quorum requirement from two to three, and permitting the Board to delegate its powers to a group of three or more, Congress stripped the Board of its prosecutorial powers and vested them in a newly created Office of the General Counsel. It makes no sense to argue, as the Board does, that Congress was content with the agency's decision-making practices under the Wagner Act in light of the fundamental changes Congress made in Taft-Hartley.

Finally, the Board suggests that New Process admitted that Congress could have enabled the Board to exercise its authority in the event of three vacancies on the Board. NLRB Brief at 40. That suggestion mischaracterizes New Process's argument. New Process raised the unremarkable observation, based on the various membership and participation rules enacted by Congress for other agencies, that Congress as well as the President have the authority and tools available to them to accommodate the loss of members of a Board or commission when its membership drops below the statutory authorized number. The leap the Board makes from Congress's inaction to its acceptance of a two-member Board is unsupported by any words in section 3(b) of the NLRA or any sound logic. There are many possible

explanations for the behavior of several Presidents and several Congresses in response to the NLRB's circumstances, but acquiescence in a two-member Board is not a likely explanation.

III. CONCLUSION

The judgment of the Court of Appeals should be reversed.

MARK E. SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
2101 L Street, N.W.,
Ste. 1000
Washington, DC 20037
Tel: (202) 331-3100

SHELDON E. RICHIE
Counsel of Record
RICHIE & GUERINGER, P.C.
100 Congress Ave.,
Ste. 1750
Austin, TX 78701
Tel: (512) 236-9220
srichie@rg-austin.com

JOSEPH W. AMBASH
JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
Tel: (617) 310-6091

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 8 - 2010
OFFICE OF THE CLERK

6093

No. 08-1457

IN THE

Supreme Court of the United States

NEW PROCESS STEEL, L.P.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NATIONAL LABOR RELATIONS BOARD

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

OF COUNSEL:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JAMES D. FAGAN, JR.
1401 Peachtree Street, NE
Atlanta, GA 30309

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Summary of Argument	2
Argument	2
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Gardner v. Applied Geographics, Inc., 18 Mass. L. Rep. 33 (Mass. Super. Ct. 2004)	8
Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009)	8-12
Narricot Indus., L.P. v. NLRB, 587 F.3d 654 (4th Cir. 2009)	7
Northeastern Land Servs., Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009)	7
Photo-Sonics, Inc. v. NLRB, 678 F.2d 121 (9th Cir. 1982)	12
Railroad Yardmasters v. Harris, 721 F.2d 1332 (D.C. Cir. 1983)	11
Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d. Cir. 2009)	7
Teamsters Local Union No. 523 v. NLRB, 590 F. 3d 849 (10th Cir. 2009)	7

Statute:

National Labor Relations Act Sec. 3 (b), 29 U.S.C. § 153(b)	passim

Miscellaneous:

Black's Law Dictionary (9th ed. 2009)	8
H.Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947)	7

Miscellaneous—Continued Page

H.R. 3020, as Passed by the House, 80th Cong., 1st Sess. (1947) 6
H.R. 3020, as Passed by the Senate, 80th Cong., 1st Sess. (1947) 7
Mason's Manual of Legislative Procedure (2000) 9
Robert's Rules of Order; Newly Revised (9th ed. 1990) 8
S. 1126, as Reported, 80th Cong., 1st Sess. (1947) 5-6
S. Rep. No. 105, 80th Cong., 1st Sess. (1947)..... 6
Webster's II; New College Dictionary (1999)..... 10

IN THE

Supreme Court of the United States

NEW PROCESS STEEL, L.P.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NATIONAL LABOR RELATIONS BOARD

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women.[1] The instant case presents an important question concerning the ability of the National Labor Relations Board to delegate its powers to a group of three or more members and the authority of such a designated group to exercise the del-

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

egated powers once the Board has been reduced to two sitting members. For over two years, the NLRB has had only two sitting members, and during that period those two members, acting as a quorum of a three-member group, have exercised delegated Board powers by issuing hundreds of decisions. The AFL-CIO and its affiliated unions have a vital interest in the validity of these NLRB decisions enforcing the National Labor Relations Act.

SUMMARY OF ARGUMENT

Section 3(b) of the National Labor Relations Act provides that the National Labor Relations Board "is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise" and that "two members shall constitute a quorum of any [such] group." 29 U.S.C. § 153(b). That provision further provides that "[a] vacancy on the Board shall not impair the right of the remaining members to exercise all powers of the Board." *Ibid.* Thus, the plain meaning of Section 3(b)'s terms is, as the NLRB has concluded, that two members of a group to which Board powers have been delegated may exercise those powers without regard to the number of vacancies on the full Board. The legislative history indicates that reading of Section 3(b) according to the plain meaning of its terms effectuates Congress's intent in drafting that provision.

The D.C. Circuit and the Petitioner New Process Steel have each offered different readings of Section 3(b) to counter the NLRB's reading of that provision. Neither the D.C. Circuit's nor the Petitioner's reading squares with the statutory text.

ARGUMENT

The National Labor Relations Board has read Section 3(b) of the National Labor Relations Act, 29 U.S.C. §

153(b), to mean that once the full Board, which has a statutory complement of five members, acts with the participation of at least three of its members to "delegate to any group of three . . . members any or all of the powers which it may itself exercise," then "two members . . . of any group [so] designated" may lawfully exercise those delegated powers during an ensuing period when three of the Board's five membership positions are vacant. *See* Pet. App. 27 n. 2; Pet. Br. 5a-6a.

The court below concluded that "the plain meaning of the statute supports [the] NLRB's reading of the statute." Pet. App. 17. In what follows, we show: first, that the conclusion reached by the court below regarding the plain meaning of the statute is correct; second, that the legislative history of Section 3(b) reinforces that plain-meaning construction of the statutory language; and finally, that neither of the contrary readings of Section 3(b) offered by the D.C. Circuit or Petitioner New Process Steel's brief can be squared with the provision's text.

1. Section 3(b)'s text leads step-by-step to the NLRB's reading of that statutory provision.

The first sentence of Section 3(b) states the full Board's authority to delegate its powers to groups of its members:

> "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."

By specifying that the Board may delegate "any or *all* of the powers which it may itself exercise," the delegation provision makes particularly clear that the full Board may delegate its full authority to a group of three or more Board members.

The third sentence of Section 3(b) states the effect that Board vacancies have on the rights and powers of the

remaining members and conjoins that statement regarding vacancies with definitions of what will constitute a quorum for the full Board and what will constitute a quorum for a group of Board members to which Board powers have been delegated:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof."

The first clause of this sentence ensures that a vacancy on the Board will not impair the right of the remaining members to exercise all of the Board's powers, including the right to exercise those powers that have been delegated to a group of Board members.

The quorum provisions that follow are joined to the vacancy provision by the conjunction "and" to make clear that no matter how many of the Board's five membership positions are vacant, three members will constitute a quorum of the full Board and two members will constitute a quorum of a designated group of members to which Board powers have been delegated. Thus, the quorum provisions state two quorum definitions – three members for the full Board and two members for a designated group of Board members. The structure of the sentence makes it clear that each definition is completely independent of the other by using the phrase "except that" to separate the definition of a designated group quorum from the definition of a full Board quorum.

The sum of the foregoing is this: The full Board may delegate "any or all of the powers which it may itself exercise" to "any group of three or more members." Any such delegation is subject to the general rule that "[a] vacancy in the

Board shall not impair the right of the remaining members to exercise all of the powers of the Board," including the right of the remaining members to exercise all of the powers delegated to those members as part of a designated group of members. And, notwithstanding that three members constitute a quorum of the full Board, two members constitute a quorum of any designated group of members to which the Board has delegated its powers. Thus, the text of Section 3(b) expressly provides that, when the Board has delegated all of its powers to a designated three-member group and later vacancies reduce the Board's complement to two of the three members of that designated group, those remaining members constitute a quorum of the group with the right unimpeded by the vacancies to exercise all of the delegated Board power.

2. The legislative history confirms that Section 3(b)'s plain meaning reflects Congress's intent in drafting that provision.

The National Labor Relations Act of 1935 provided for a three-member NLRB. Section 3(b) of the 1935 NLRA provided:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." 49 Stat. 449, 451 (1935).

Pursuant to this provision, the original NLRB issued hundreds of decisions during periods when a vacancy reduced the Board to two members. *See* NLRB Br. 3 n. 1.

In 1947, Congress both increased the size of the Board to five members and amended Section 3(b). The impetus for these changes came from the Senate Labor Committee, which favorably reported a bill that would have increased the size of the Board to seven members. S. 1126, as Reported, 80th Cong., 1st Sess. 6 (1947), reprinted in 1

NLRB, *Legislative History of the Labor Management Relations Act, 1947* 106 (1948) ("Leg. Hist."). Along with increasing the size of the NLRB to seven members, the Senate Labor Committee bill would have amended Section 3(b) to read as follows:

> "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and four members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." S. 1126, as Reported, 6, 1 Leg. Hist. at 107.

The Senate Labor Committee explained the purpose of these proposed changes as follows:

> "The expansion of the Board from three to seven members, which this bill proposes, would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage, and to leave the remaining member, not presently assigned to either panel, to deal with problems of administration, personnel, expenditures, and the preparation of the budget." S.Rep. No. 105, 80th Cong., 1st Sess. 8 (1947), 1 Leg. Hist. at 414.

In other words, the Senate Labor Committee proposals were intended to allow the Board to increase its productivity by creating multiple three-member groups that would decide cases in the same manner as the original three-member Board.

The bill that passed the House would neither have changed the size of the Board nor amended Section 3(b). H.R. 3020, as Passed by the House, 80th Cong., 1st Sess. 14-15 (1947), 1 Leg. Hist. at 171-72. But the bill that passed the

Senate included the increase in Board membership and amendments to Section 3(b) recommended by the Senate Labor Committee. H.R. 3020, as Passed by the Senate, 80th Cong., 1st Sess. 75-76, 1 Leg. Hist. at 233-34. In conference, the House and Senate agreed to increase the size of the Board to five members, rather than to seven members as the Senate had proposed, and to adopt the Senate amendments to Section 3(b) with the size of the full Board quorum reduced from four to three members to reflect the smaller increase in the size of the Board. H.Conf. Rep. No. 510, 80th Cong., 1st Sess. 4-5 (1947), 1 Leg. Hist. at 508-509.

The legislative history thus indicates that the purpose of Section 3(b)'s delegation, vacancy, and quorum provisions was to empower the expanded NLRB to create three-member groups that would decide cases in the same fashion as the original three-member NLRB. By specifying that "two members shall constitute a quorum of any group designated" by the full Board, the text of Section 3(b) expressly provides that two members of such a three-member group may lawfully continue to exercise the group's delegated powers in the face of a group vacancy just as two members of the original three-member Board continued to exercise the Board's powers in the face of a Board vacancy.

3. Against that statutory background, it is hardly surprising that, along with the court below, every circuit – but one – to have considered the question has sustained the NLRB's reading of Section 3(b). *See Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654, 659-660 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 423-24 (2d. Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009).

The lone exception is the D.C. Circuit's decision in

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. pending No. 09-377 (filed Sept. 29, 2009). But the D.C. Circuit's alternative reading of Section 3(b) cannot be squared with the statutory language.

The D.C. Circuit's contrary construction rests on reading the phrase "three members shall, at all times, constitute a quorum of the Board" in the third sentence of Section 3(b) as mandating "that the Board quorum requirement must be satisfied '*at all times.*'" 564 F.3d at 472 (emphasis in original). Thus, while the D.C. Circuit began by correctly recognizing that "a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members," the Court of Appeals severely limited the effect of that recognition by adding that the delegee group may exercise its powers only "so long as the Board quorum requirement is, 'at all times,' satisfied" and specifying that to satisfy that requirement the Board must have at least three sitting members at all times. *Id.* at 472-73.

The D.C. Circuit's reading improperly transforms Section 3(b)'s definition of what constitutes a Board quorum into a minimum membership requirement that must be satisfied at all times for any powers of the Board – including those powers that the Board has delegated to a designated group of members – to be exercised. That is a wholly improper interpretation of the term "quorum."

A quorum is "the minimum number of members (usu[ally] a majority of all members) who must be present for a deliberative assembly to legally transact business." *Black's Law Dictionary* 1370 (9th ed. 2009). *See Robert's Rules of Order; Newly Revised* §39 (9th ed. 1990) ("Quorum"). "The purpose of a quorum requirement is to insure that a certain number of persons shall convene and transact the business at hand." *Gardner v. Applied*

Geographics, Inc., 18 Mass. L. Rep. 33, 35 (Mass. Super. Ct. 2004). *See Mason's Manual of Legislative Procedure* § 49 (2000) ("Right to Act for a Body – Quorum"). Giving the term "quorum" its normal meaning, the sole point of Section 3(b)'s full Board quorum definition is to establish the minimum number of members who must participate for the full Board to act.

There is nothing in the statutory language or legislative history to suggest that Section 3(b) establishes a minimum Board membership requirement that must be satisfied at all times in order for any Board powers – including those that have been delegated – to be exercised. Had Congress meant to establish such a minimum membership requirement, it would have drafted the statute in terms providing "that at all times the Board must be comprised of three members." Chamber of Commerce Br. 3 (capitalized as heading in original). But, contrary to the Chamber of Commerce, that is *not* what "the NLRA . . . states." *Ibid.*

Given the meaning of the term "quorum," the D.C. Circuit could not have been more wrong in its assertion that "the Board and delegee group quorum requirements are not mutually exclusive." 564 F.3d at 472. The question of whether the full Board has a quorum only arises when the full Board undertakes to transact business. But with respect to the exercise of powers that have been delegated to a group of Board members, it is the designated group and not the full Board that is transacting business. Thus, with respect to any particular piece of business, there will never be an occasion for both the full Board and the group quorum definitions to apply, because it will either be the full Board or the designated group – but not both – that is transacting the business in question. This common sense point is reflected in the fact that the full Board quorum definition and the group quorum definition are separated by the phrase "except that," which clearly indicates that the

group quorum definition is an exception to the Board quorum definition.

The D.C. Circuit's reliance on the phrase "at all times" in Section 3 (b) as a means for transforming the definition of a full Board quorum into a minimum membership requirement takes that phrase entirely out of its statutory context. The relevant statutory context is provided by the full sentence in which that phrase appears:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence [of Section 3(b)]."

The principal meaning of the word "constitute" is "to make up." *Webster's II New College Dictionary* 241 (1999). That is obviously the sense in which that word is used in the third sentence of Section 3(b). The quorum clause is joined to the vacancy clause by the conjunction "and" in order to establish that no matter how many Board vacancies there may be, three members "shall, at all times, constitute a quorum." Without this specification, the normal understanding would be that a simple majority of the sitting Board members constitutes a quorum of the full Board. *See* 564 F.3d at 473 ("Quorums . . . are usually majorities."). Thus, the point of the specification that "three members of the Board shall, at all times, constitute a quorum" is that, regardless of how many Board seats are filled, it takes three Board members to make up a quorum of the full Board.

The statutory language most certainly does *not*, as the D.C. Circuit would have it, "impose[] a requirement for a three-member quorum 'at all times'" in the sense that the Board must be populated by three sitting members "at all

times" in order for a designated group of Board members to exercise delegated Board powers. To the contrary, the statutory language expressly provides that the two-member quorum requirement governing the exercise of delegated powers by a designated group is "except[ed]" from the three-member quorum requirement applicable to the full Board.

Contrary to the D.C. Circuit, treating the two quorum requirements as independent does *not* allow the Board to "circumvent the statutory Board quorum requirement." 564 F.3d at 473. The three-member Board quorum requirement applies to any action of the full Board, including any delegation of Board powers to a group of three members, an action that can only be taken by the full Board. Thus, if the Board has only two members there is no longer a quorum of the full Board that could act to delegate its powers to a three-member group.[2]

4. The Petitioner argues that "[a] vacancy in a three-member group precludes any action by that group unless the missing member is replaced." Pet. Br. 21-22. The Petitioner's theory is that "the delegee group cannot issue decisions with only two members because the group, as the entity that received the delegation, [i]s no longer fully constituted and therefore no longer a proper delegee." Pet. Br. 24 n. 10.

---

[2] The D.C. Circuit sought to buttress its reading of Section 3(b) by drawing on "basic tenets of agency and corporation law" to the effect that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." 564 F.3d at 473. However, as the D.C. Circuit itself recognized in construing a similarly worded provision in the Railway Labor Act, "the applicable rule in the present case is provided not by the common law of corporations but by the vacancies provision of the statute itself, which clearly and expressly provides that vacancies in the Board shall not impair the powers of the Board." *Railroad Yardmasters v. Harris*, 721 F.2d 1332, 1343 n. 30 (D.C. Cir. 1983).

The Petitioner's interpretation of Section 3(b) has been rejected by every circuit that has considered the question, including the D.C. Circuit. *See Laurel Baye*, 564 F.3d at 472-73. *See also Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 123 (9th Cir. 1982). Indeed, as we have noted, the D.C. Circuit expressly recognized that the statute provides that "a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members." *Laurel Baye*, 564 F.3d at 472.

Section 3(b) does not place any limit on the authority of two members of a designated group to exercise the group's delegated powers. And, the text of that provision rules out the theory that a vacant seat might constitute an exception to the group quorum definition by providing that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board."

The Petitioner and its *amici* also argue that, as a matter of policy, two-member decisionmaking under the NLRA is a bad idea. Pet. Br. 34-35; Ch. Comm. Br. 15-20; Carpenters Br. 8-20. But the 1947 Congress that put Section 3(b) in its present form obviously disagreed. Against the background of the original three-member NLRB issuing hundreds of decisions with only two sitting members, the 1947 Congress expressly authorized the expanded five member Board to delegate its decision making powers to three-member groups and expressly authorized those groups to exercise the delegated powers with the participation of only two members.

The long and the short of the matter is that Congress has provided that once the full Board has delegated Board decisionmaking powers to a designated group of three or more members, two members of that group may exercise the delegated powers regardless of what has made the other designated group members unavailable to participate.

CONCLUSION

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JAMES D. FAGAN, JR.
1401 Peachtree Street, NE
Atlanta, GA 30309

AMICUS CURIAE BRIEF

149

No. 08-1457

Supreme Court, U.S.
FILED
DEC 30 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MARSHALL B. BABSON
Counsel of Record
CHRISTINE M. FITZGERALD
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

5B2 2116
TC+TA

210A

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE NLRA CLEARLY STATES THAT AT ALL TIMES THE BOARD MUST BE COMPRISED OF THREE MEMBERS 3

II. THREE-MEMBER PANELS WERE NOT INTENDED TO SUPPLANT THE REQUIREMENT OF A THREE-MEMBER BOARD 6

III. THE SEVENTH CIRCUIT DECISION MISINTERPRETS SECTION 3(b) OF THE NATIONAL LABOR RELATIONS ACT 10

IV. TWO-MEMBER DECISIONS IMPERMISSIBLY DISTORT ADMINISTRATIVE PROCESS 15

CONCLUSION 21

TABLE OF AUTHORITIES

Cases PAGE

AM Property Holding Corp.,
352 NLRB 279 (2008) 18

A.T. Massey Coal Co. v. Barnhart,
472 F.3d 148 (4th Cir. 2006) 14

Am. Trucking Assocs., Inc. v. Atchison, T. & S.F.R. Co., 387 U.S. 397 (1967)..... 16

Baker v. Carr, 369 U.S. 186 (1962)..... 19

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 13, 17

Corley v. United States, 129 S. Ct. 1558 (2009) 12

Duncan v. Walker, 533 U.S. 167 (2001)..... 12

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)..... 15

Guard Publ'g Co., 351 NLRB 1110 (2007)..... 17

John Deklewa & Sons, 282 NLRB 1375 (1987) 16

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB,
564 F.3d 469 (D.C. Cir. 2009) 4, 5, 6, 20

Magic Beans, LLC, 352 NLRB 872 (2008) 18

Medco Health Solutions of Spokane, Inc.,
352 NLRB 640 (2008) 18

PAGE

Michigan v. Thomas, 805 F.2d 176 (6th Cir. 1986) 17

Mkt. Co. v. Hoffman, 101 U.S. 112 (1879) 12

N.Y. State Office of Children & Family Servs. v. U.S. Dep't of Health & Human Services. Admin. for Children & Families, 556 F.3d 90 (2d Cir. 2009) 14

Narricot Industries, L.P. v. NLRB, 587 F.3d 654 (4th Cir. 2009) 10, 11

Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009) 10

New Process Steel, L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009) 10

Nixon v. U.S., 506 U.S. 224 (1993) 20

Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009) 8, 13, 14, 15

Teamsters Local Union No. 523 v. NLRB, Nos. 08-9568, 08-9577, 2009 U.S. App. LEXIS 28181 (10th Cir. Dec. 22, 2009) 14, 15

Texas v. U.S., 866 F.2d 1546 (5th Cir. 1989) 17

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 12

U.S. v. Akzo Coatings of Am., Inc., 949 F.2d 1409 (6th Cir. 1991) 17

Y.S.K. Construction Co., Inc. v. U.S., 30 Fed. Cl. 449 (Ct. Fed. Cl. 1994) 14

PAGE

Statutes and Rules

28 U.S.C. § 46 9

29 U.S.C. § 153(a) 3

29 U.S.C. § 153(b) ..... *passim*

Labor-Management Relations Act, ch. 120, sec. 101, § 3(b), 61 Stat. 136, 139 (1947) 12

Wagner Act, Pub. L. No. 198, § 3(b), 49 Stat. 449, 451 (1935) 12

Legislative and Administrative Materials

93 Cong. Rec. 7677 (June 23, 1947) 8

H.R. Rep. No. 80-245 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 (1948) 9

Quorum Requirements, 2003 OLC LEXIS 20 (Office of Legal Counsel, March 4, 2003)..... 6

S. Rep. No. 80-105 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 (1948) 8, 9

Treatises and Periodical Materials

1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.6 (3d ed. 1994)..... 16

PAGE

John E. Higgins, Jr., *Taft-Hartley Symposium: The First Fifty Years: Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 Cath. U. L. Rev. 941, 953 (Spring 1998) 9

Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence, Chevron Deference Agency Jurisdiction and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1551 15

David Shadovitz, *NLRB Case Creates Uncertainty*, Human Resources Executive Online (Nov. 30, 2009), http://www.hreonline.com/HRE/story.jsp?storyID=295569013..... 4

John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, The Labor Lawyer, Summer 2000, Vol. 16, No. 1, at 12 ..... 8, 9

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a non-profit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the litigants.

This case presents the question of whether the National Labor Relations Board (the "NLRB" or the "Board"), the independent federal agency charged with enforcing the National Labor Relations Act ("NLRA"), has authority to decide cases with only two sitting Members, where 29 U.S.C. § 153(b)

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

explicitly provides that "three members of the Board shall, at all times, constitute a quorum of the Board." This question is of significant concern to the Chamber as many of its members are employers subject to the NLRA.

The decision below upholding the authority of a two-member Board to issue decisions and orders contravenes the plain language of the NLRA requiring a quorum of three Members. As the largest representative of employers in the United States, the Chamber has a vital interest in ensuring that the federal labor law regime to which its members may be subject is rational, fair, and consistent, and that the agency responsible for enforcing the NLRA at all times is acting within its authority in fulfilling its obligations and responsibilities under the statute.

SUMMARY OF ARGUMENT

On December 20, 2007, the Board, which then consisted of only four Members, two of whom had terms set to expire December 31, 2007, delegated its powers to three of its Members effective December 28, 2007. The Board intended the delegation of powers to permit the two Members remaining as of January 1, 2008 to issue decisions and orders as a quorum of the three-member group. The explicit language of section 3(b) of the NLRA makes clear that a two-member Board does not have the authority to act. The decision below upholding two-member Board decisions misinterpreted section 3(b) of the NLRA by, *inter alia*, ignoring its overt requirement that the Board must have three Members "at all times."

Allowing a two-member Board to issue decisions and orders also contravenes the purposes of the

NLRA. It is clear from the relevant legislative history that Congress intended the Board to hear cases in panels of three, but did not intend to authorize two Members to do all of the work of a full five-member Board. Approval of a two-member NLRB, moreover, is not only inconsistent with the explicit requirement of section 3(b), but also distorts and dilutes the administrative process to which the parties are due under the statute.

In view of the foregoing, the judgment of the court of appeals should be reversed.

ARGUMENT

I. THE NLRA CLEARLY STATES THAT AT ALL TIMES THE BOARD MUST BE COMPRISED OF THREE MEMBERS.

The NLRB consists of five Members appointed to staggered five-year terms by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a). Section 3(b) of the NLRA provides that:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise [the "delegation provision"]. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board [the "vacancy provision"], and three members of the Board shall, at all times, constitute a quorum of the Board [the "Board quorum provision"], except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [the "delegee group quorum provision"].

Pursuant to the delegation provision, on December 20, 2007, the then four-member Board, delegated its powers to three Members effective December 28, 2007. Given that two of the four Members had terms set to expire December 31, 2007, the Board, relying on the vacancy and delegee group quorum provisions, intended the delegation of powers to permit the two Members remaining to issue decisions and orders as a quorum of the three-member group. Indeed, since this delegation, the Board has issued hundreds of decisions as a two-member panel or group.[2]

These two-member decisions run afoul of the Board quorum provision of section 3(b). As the D.C. Circuit found in *Laurel Baye Healthcare of Lake Lanier, Inc. v. National Labor Relations Board*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009), section 3(b) permits the Board to act with two Members *only if* the Board maintains a quorum of three sitting Members at all times. The Court concluded that "[a] modifying phrase as unambiguous as ['at all times'] denotes that there is no instance in which this Board quorum requirement may be disregarded." *Id.* at 473.

Noting that the Board quorum and delegee group quorum provisions are not mutually exclusive, the Court observed that the use of the word "except" in the statute indicates "that the delegee group's abil-

---

[2] In fact, only 77 cases are affected by the issue at hand. David Shadovitz, *NLRB Case Creates Uncertainty*, Human Resources Executive Online (Nov. 30, 2009), http://www.hreonline.com/HRE/story.jsp?storyID=295569013. In all other cases, it appears that the Respondent has complied with the Board's decision and order.

ity to act is measured by a different numerical value." *Id.* at 472. Moreover, the Court found that:

> Congress's use of differing object nouns within the two quorum provisions indicates clearly that each quorum provision is independent from the other. The establishment of a two-member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole. In fact, it does not seem odd at all that a sub-unit of any body would have a smaller quorum number than a quorum of the body as a whole.

Id. at 473. Thus, the additional provision of section 3(b) that allows two Members of the Board to act on behalf of a three-member group to whom the Board has delegated authority does not permit a two-member quorum of a group to supplant a three-member quorum of the Board. *Id.* at 472. In this regard, the Court in *Laurel Baye* stated that:

> [i]t therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum "at all times" would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization. Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met at all times.

Id. at 473. According to the unambiguous words of the statute, the two-member quorum of the group or panel is intended to *subserve* the Board's general three-member quorum requirement, *not supersede*

it. Consequently, the lower court's finding here that the NLRB was authorized to hear and decide the dispute at issue is unsupported by the plain meaning of section 3(b).

The decision of the lower court finding that a panel of the Board may continue to operate once the Board itself loses its quorum also is inconsistent with fundamental principles of agency law. As the D.C. Circuit recognized, when the delegating authority's power lapses, the delegation itself lapses. *Id.* at 473; *see also* 29 U.S.C. § 153(b) ("any or all of the powers which it may itself exercise"). Similarly, the Court discerned that permitting two Members to decide cases contravened "basic tenets" of corporation law, which maintain that an agent's delegated authority terminates upon the resignation or termination of the delegating authority and that a "delegating board of director's powers are suspended whenever the board's membership falls below a quorum." *Id.* at 473. Thus, when the Board loses a third Member, any delegation that the Board previously made becomes moot.[3]

II. THREE-MEMBER PANELS WERE NOT INTENDED TO SUPPLANT THE REQUIREMENT OF A THREE-MEMBER BOARD.

The D.C. Circuit in *Laurel Baye* correctly recognized that in the Taft-Hartley Act's 1947 amendments

[3] Whether or not dispositive of the issue at hand, it is troubling that a hypothetical situation posited by the Office of Legal Counsel became the legal basis upon which the Board premised a delegation to a three-member group that the Board knew effectively would *never* be comprised of three sitting Members, thereby circumventing the three-member Board quorum provision contained in section 3(b). *See Quorum Requirements*, 2003 OLC LEXIS 20 (Office of Legal Counsel, March 4, 2003).

to the NLRA expanding the Board from three to five Members, Congress wanted to ensure that the Board was authorized to hear cases in three-member panels or groups, but that at all times, a quorum of the Board shall nevertheless be three Members. *Id.* at 470, 475. In fact, the legislative history of the Taft-Hartley amendments demonstrates that Congress never intended that two Members would constitute a quorum of the overall Board.

The only reference in the legislative history to the precise issue at hand may have been a prophetic one. Senator Joseph C. O'Mahoney opposed the Senate overriding President Truman's veto of the Taft-Hartley Act, and sounded the alarm to his fellow Senators that the language of the amended section 3(b) was capable of being read in such a manner as to obviate the three-member Board quorum which he deemed essential. Senator O'Mahoney stated in floor remarks:

> Observe that the Board is given complete and plenary power to delegate any or all of its power to any group of three; and then any two members of that group of three can speak for the Board. So we have a bill—and I invite the attention of lawyers in this body to this—which not only authorizes the Board to delegate its powers, but authorizes the Board to delegate its powers, and all of them, *to less than a quorum of the Board*. This we do in the name of reducing government in Washington. This we do in the name of returning control of the economic life of the people of the United States to the people of the United States; and we undertake a program of delegated powers which,

> so far as I know, has never been suggested before in the history of this Government.

93 Cong. Rec. 7677, 7679 (June 23, 1947) (emphasis added). Senator O'Mahoney's Senate colleagues paid no heed to his warning, however, and the Senate proceeded to override President Truman's veto of the bill. *But see Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 422 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009) (stating that the Court was "reluctant to draw much significance from a lone remark by a single senator").

The purpose of adding additional Members to the then three-member NLRB was to allow the Board to decide more cases by creating multiple panels of three.[4] S. Rep. No. 80-105, at 8 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 415 (1948). In its day-to-day operations the Board has carried out this Congressional intent. As John C. Truesdale, former Board Member and Executive Secretary of the NLRB explained, "[t]he Board's internal procedures for processing cases have been well established for years. All cases are initially assigned to a panel of three members. There are five panels, and each member is the chair of one panel and participates in two others." John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, The Labor Lawyer, Summer 2000, Vol. 16, No. 1, at 12. For each case considered, the three-member panels, and their staff, prepare a draft

[4] In fact, in order to enable even more cases to be heard by three-member panels, the Senate version of the bill that ultimately became the Taft-Hartley Act proposed a seven-member Board. S. Rep. No. 80-105, at 19.

decision and order. The remaining Members not serving on the panel are given the opportunity to review the draft decisions. Thus, "no case will issue unless it reflects the majority opinion of the full Board." *Id.* at 12, 13 n.1. Furthermore, all Members have "an absolute right to join a panel." John E. Higgins, Jr., *Taft-Hartley Symposium: The First Fifty Years: Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 Cath. U. L. Rev. 941, 953 (Spring 1998). Likewise, any Member, regardless of whether he or she sits on the panel hearing the case, may request that the case be heard by all five Board Members. *Id.*[5]

In addition, the notion that two-member Board decisions are invalid is supported by the fact that with the Taft-Hartley amendments, Congress intended the NLRB to function more like the federal courts of appeals, which hear cases in panels of three. 28 U.S.C. § 46; S. Rep. No. 80-105, at 415 ("Since it is the belief of the committee that Congress intended the Board to function like a court. . . . Since the Board's function is largely a judicial one, *conformance with the practices of appellate courts*. . . .") (emphasis added); H.R. Report No. 80-245 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 297 (1948) ("[t]he Bill therefore abol-

[5] Notably, *both* former Members Truesdale and Higgins previously have opined that the Board is not authorized to act when it has fewer than three Members. Truesdale, at 6 (noting that during the first year of the Clinton presidency, the Board only had two Members, "less than the necessary quorum."); Higgins, at 954, n. 43 (pointing out that in 1993, the Board only had two Members, "one short of its statutory quorum," and could not act on contested cases).

ishes the existing [NLRB], and creates in its place a new bipartisan Board of *three* fair and impartial persons. . . . Its sole function will be to decide cases . . . according to the facts.") (emphasis added). Moreover, the lower court acknowledged that Congress wrote the statute this way in light of concerns about the courts of appeals hearing cases in panels of two. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 849 (7th Cir. 2009).

III. THE SEVENTH CIRCUIT DECISION MISINTERPRETS SECTION 3(b) OF THE NATIONAL LABOR RELATIONS ACT.

The Seventh and Other Circuits

In upholding the validity of two-member Board decisions, the Seventh Circuit held that the "plain meaning" of section 3(b) supported the Board's December 2007 delegation of power. In reaching this conclusion, the court relied upon the language of section 3(b) regarding the quorum of a group, and upon the First Circuit's decision in *Northeastern Land Services v. National Labor Relations Board*, which similarly found that "the Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)." *New Process Steel*, 564 F.3d at 846 (*quoting Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009)). Likewise, in *Narricot Industries, L.P. v. National Labor Relations Board*, 587 F.3d 654, 659 (4th Cir. 2009), the Fourth Circuit found that the two-member Board was empowered to act in light of the "unambiguous text" of section 3(b).

Neither the Seventh Circuit below or the First Circuit in *Northeastern Land Services*, however, discussed or reconciled the competing language in section 3(b) that requires a three-member quorum of the Board, as opposed to the group, "at all times." The Fourth Circuit in *Narricot Industries* simply dismissed the three-member quorum of the Board language on the basis that it was "an overly narrow construction of the modifying phrase that directly follows." *Narricot*, 587 F.3d at 659. In the view of the Fourth Circuit, had Congress intended that the Board have a quorum of three regardless of whether its authority is delegated to a group, "it would have simply omitted the words 'except that'" from the statute and as a result the statute would have contained "two independent quorum clauses, one applicable to the Board and the other to three-member groups." *Id.* at 660.

These decisions simply ignore the plain and unambiguous language of section 3(b), which states that "three members of the Board shall, *at all times*, constitute a quorum," and thereby fail to give proper effect to section 3(b)'s separate quorum requirements for the Board and for a delegated group (emphasis added). Indeed, in pursuit of a rationale that would allow the Board to continue to function with only two Members, the First, Fourth and Seventh Circuits' decisions fail to account for, much less reconcile, the unconditional "at all times" language, and effectively re-write section 3(b) to provide a two-member quorum requirement for the Board. Interestingly, the "at all times" language appeared in the original Wagner Act, and in 1947 Congress amended the Board quorum requirement from "two" to "three," a completely unnecessary exercise if two members were intended to act for

the Board under all circumstances. Wagner Act, Pub. L. No. 198, § 3(b), 49 Stat. 449, 451 (1935); Labor-Management Relations Act, ch. 120, sec. 101, § 3(b), 61 Stat. 136, 139 (1947). The amendment of "two" to "three" in 1947 makes clear that Congress intended that a quorum of three Members was required "*at all times*" for the Board to act, but that in those instances where at least three Members sit on the Board, a panel or group is authorized to act pursuant to a valid delegation should one of the panel Members become unable to participate. The *sine qua non* "at all times," however, is that there be at least three sitting *Board* Members.

The two-member Board's insistence that its power to act is grounded in the "plain meaning" of section 3(b) is particularly troubling because, as this Court has held, it is not a "plain meaning" interpretation of a statute when vital provisions of that statute are thereby rendered unnecessary or nugatory. *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word."). *See also Corley v. United States*, 129 S. Ct. 1558, 1560 (2009); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Yet that is precisely the result that obtains here if the Board's and the Seventh Circuit's reading of section 3(b) is ratified. In what circumstance would any NLRB facing a deficit of three members *not* delegate its powers to a three-member group so that the remaining two Members be authorized to act at all times for the full Board? And if such a delegation so conveniently allows circumvention of the requirement that the Board at all times have a quorum of

three Members, why did Congress stipulate a three-member quorum at all? In fact, as the D.C. Circuit recognized, the Board's reading of section 3(b) simply reads the three-member Board quorum requirement out of the statute.[6] A fairer reading of the plain language of section 3(b) would give full effect to all of the provisions of section 3(b), both the Board quorum requirement *and* the delegee group quorum requirement, as did the D.C. Circuit, and would not provide justification for Senator O'Mahoney's concern in 1947 that the exception clause in section 3(b) is capable of being read as swallowing the entire rule.[7] Certainly one must presume that Congress' insistence on a three-member quorum "at all times" was neither an empty gesture, nor merely an inconvenient obstacle awaiting circumnavigation by a clever NLRB engaged in statutory legerdemain.

The Second and Tenth Circuits

The Second and Tenth Circuits took a somewhat different approach by applying a *Chevron* analysis. In *Snell Island SNF LLC v. National Labor Relations Board*, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009), the Court applied the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for reviewing an administrative agency's attempt to give meaning to the statute it administers. *Snell*, 2009 U.S. App. LEXIS 13008, at *27-41. After finding that the Con-

---

[6] As for the Fourth Circuit's concern that the "except" language of section 3(b) not be read "overly narrow[ly]," the answer is simply that anything other than a narrow reading of the "exception" clause renders the Board quorum provision of section 3(b) totally meaningless.

[7] See pp. 7-8 *supra*.

gressional intent of the three-member Board quorum requirement in section 3(b) is unclear, the Second Circuit applied the second step of the *Chevron* analysis, which it believed required it to defer to the Board's interpretation of its own power to act with two Members under the NLRA. *Id.* at *38-41. Likewise, in *Teamsters Local Union No. 523 v. National Labor Relations Board*, Nos. 08-9563, 08-9577, 2009 U.S. App. LEXIS 28181 (10th Cir. Dec. 22, 2009), the Court, noting that the split of opinion among the Circuit courts on the two-member NLRB issue is evidence of the ambiguity of the statute, utilized the second step of the *Chevron* analysis and upheld the Board's delegation of authority as a permissible interpretation of section 3(b).

While a two-step *Chevron* analysis of an agency's authority to act in a particular regard or with respect to a particular issue or subject may be appropriate when a statute is ambiguous, *e.g.*, *N.Y. State Office of Children & Family Servs. v. U.S. Dep't of Health & Human Services. Admin. for Children & Families*, 556 F.3d 90 (2d Cir. 2009), it seems unlikely that such an analysis resulting in deferral to the agency's own view of its authority to act in any matter is apt where, as here, the question presented is the agency's primary power or authority to act at all. *E.g.*, *A.T. Massey Coal Co. v. Barnhart*, 472 F.3d 148, 167 (4th Cir. 2006) (noting that before proceeding to a *Chevron* analysis, the Court must conclude that Congress delegated to the agency the authority to act); *Y.S.K. Construction Co., Inc. v. U.S.*, 30 Fed. Cl. 449, 458-59 (Ct. Fed. Cl. 1994) (finding that where the "central inquiry" is whether the agency in question has the authority to interpret the statute, *Chevron* review is inappropriate because "[g]iving deference to an agency in

such a circumstance would beg the question."); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence, Chevron Deference Agency Jurisdiction and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1551 ("courts should not acquiesce to agencies' efforts to define their own powers."). Notably, the *Chevron* cases cited both by the Second and Tenth Circuits go to the *scope* of agency power, not the agency's power to act in *any* manner. *Snell*, 2009 U.S. App. LEXIS 13008, at *14-16; *Teamsters Local Union No. 523*, 2009 U.S. App. LEXIS, at *3. This Court need not decide whether a *Chevron* analysis is appropriate where the agency is passing on its own power or authority to act, however, because the statute herein is clear on its face that a quorum of the Board at all times must be comprised of three Members.[8]

IV. TWO-MEMBER DECISIONS IMPERMISSIBLY DISTORT ADMINISTRATIVE PROCESS.

To allow the Board to act with only two Members not only contravenes the explicit text of section 3(b), but impermissibly distorts administrative process. The NLRB, like other administrative agen-

---

[8] Moreover, even if the statute were not plain on its face, the NLRB's construction of the statute raises serious separation-of-powers concerns by permitting an independent regulatory agency to supplant the necessity of the President and the Senate to carry out their Article II responsibilities to nominate and confirm officials to constitute the requisite quorum. As such, the constitutional avoidance canon would require the construction advocated by the Petitioner. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

cies, does not merely "decide cases" as does an Article III court. Administrative agencies serve *both* a quasi-legislative as well as a quasi-judicial function. 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.6 (3d ed. 1994) ("Congress wisely chooses to delegate most policy decisions to expert bodies that can react rapidly to new developments and to new understandings in their areas of expertise."). That means that administrative agencies are sifting facts, relying upon their cumulative experience in administering the statute, and constantly adjusting the application of administrative norms to effectuate the broad statutory mandates articulated by Congress. It is in that "adjusting" of administrative norms or standards based upon each agency's cumulative experience and expertise that the informality and flexibility of administrative jurisprudence and decision-making is given full play. As this Court has recognized:

> [F]lexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Am. Trucking Assocs., Inc. v. Atchison, T. & S.F.R. Co., 387 U.S. 397, 416 (1967). *See also John Deklewa & Sons*, 282 NLRB 1375, 1388 (1987) ("Cumulative experience [of the Board] begets understanding and

insights by which judgments are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.") This, if you will, is the genius or not of administrative process.

The NLRB, for example, is *not* bound by principles of *stare decisis* precisely because adherence to the rule *in each case* is contrary to the very function of an administrative agency. *E.g., U.S. v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991) (citing *Michigan v. Thomas*, 805 F.2d 176, 184-85 (6th Cir. 1986) ("An administrative agency should not be, and is not . . . estopped by its prior precedent from altering its decisions due to increased expertise."); *Texas v. U.S.*, 866 F.2d 1546, 1557 (5th Cir. 1989) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984) ("An agency, however, is not bound by the shackles of *stare decisis* to follow blindly the interpretations that it, or the courts of appeals, have adopted in the past.").

Congress intended, rather, that the administrative agencies in general, and the NLRB in particular, "adjust" and "fine tune" the day-to-day rules based upon evolving experience at the agency in administering the statute and in giving effect to the statute's requirements. What topics may constitute a mandatory subject of bargaining, for example, are not static, but dynamic, as a workplace replete with personal computers, email and personal communication devices with access to the Internet make clear. *E.g., Guard Publ'g Co.*, 351 NLRB 1110 (2007), *aff'd in part, rev'd in part*, 571 F.3d 53 (D.C. Cir. 2009). Congress certainly reasonably could have anticipated that such compelling and difficult questions not be answered, adjusted or defined by a minority

of sitting Board Members. It is true that the two remaining Members have self-proclaimed that they would only apply "existing law," but aside from such a declaration effectively denying the very administrative dynamic that Congress intended, what additional adjustments or accommodations were nevertheless made in any particular case by these remaining Members to allow consideration, agreement and issuance of a decision?[9] Could such an adjustment or accommodation by the decision makers unintentionally result in a dilution of the full administrative process to which each litigant in any contested matter was due?

The decisions of the two-member Board at issue herein are replete with instances of one Member putting aside his or her own positions for "institutional reasons." *E.g.*, *Magic Beans, LLC*, 352 NLRB 872, 873 n.5 (2008) (noting that while then-Chairman Schaumber would permit a post objection election in a case such as this one, he applied extant Board precedent "for institutional reasons for deciding this case"); *Medco Health Solutions of Spokane, Inc.*, 352 NLRB 640, 641 n.8 (2008) (stating that while then-Chairman Schaumber would defer the information request, Board precedent was to the contrary, so "for institutional reasons" he concurred in finding that the deferral of the information request was inappropriate); *AM Property Holding Corp.*, 352 NLRB 279, 281 n.9 (2008) (noting that Member Liebman concurred with the decision to deny the motion for special remedies "for institutional reasons"). In each such case, the setting aside of a Member's view of what the statute may require rep-

[9] Chairman Liebman is a Democrat and Member Schaumber is a Republican.

resents an adjustment or accommodation that is inconsistent with administrative due process. Had a properly constituted three-member Board considered these cases, it is possible that any issue set before the Board would have been decided differently, quite apart from whether that disposition constituted a reversal, departure or "fine tuning" of prior NLRB decisional law. As such, a two-member Board, despite the good intentions of the remaining Members, fundamentally alters the statutory paradigm that Congress envisioned and denies the parties before the Board the administrative process Congress prescribed.[10]

The inability or unwillingness of the President to nominate or the Senate to confirm Members of the NLRB may be regrettable, unfortunate, or merely inconvenient, but it certainly is not an adequate basis for contorting statutory language to avoid untoward results. Our constitutional system of government mandates a modicum of comity by each branch for the other and certainly does not sanction the contortion of statutory language merely because political considerations have slowed or stalled the nomination and confirmation process. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . . or the impossibility of a court's undertaking independent

[10] *Prior* to December 28, 2007, current Chairman Liebman and Member Schaumber participated together in approximately 825 reported decisions. In 238 of those decisions, Members Liebman and Schaumber were on *opposite* sides of at least one issue.

resolution without expressing lack of the respect due coordinate branches of government"). *See also Nixon v. U.S.*, 506 U.S. 224, 235 (1993) (finding that judge's request for invalidation of his impeachment was nonjusticiable as a political question and stating that "opening the door of judicial review to the procedures used by the Senate in trying impeachments would 'expose the political life of the country to months, or perhaps years, of chaos.'") The D.C. Circuit stated the principle precisely correctly in *Laurel Baye*: "we may not convolute a statutory scheme to avoid an inconvenient result." 564 F.3d at 476. The Court should decline the invitation to convolute the statutory language at issue here. Rather, the Court should give full effect to Congress' explicit intent that national labor policy at all times be determined by not less than three sitting Members of the NLRB.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MARSHALL B. BABSON
Counsel of Record
CHRISTINE M. FITZGERALD
HUGHES HUBBARD
& REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

AMICUS CURIAE BRIEF

149

(5)

DEC 30 2008

No. 08-1457

In The Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE MICHIGAN REGIONAL COUNCIL OF CARPENTERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Dennis M. Devaney
Counsel of Record
Jeffrey D. Wilson
George S. Fish
Strobl & Sharp, P.C.
300 E. Long Lake Rd., Suite 200
Bloomfield Hills, MI 48304
(248) 540-2300

Counsel for Amicus Curiae

582706
TC+TA

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

311B

QUESTIONS PRESENTED

A. Does the National Labor Relations Board have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board"?

B. Do decisions by two members improperly distort the decision-making process of the five member National Labor Relations Board created by Congress in 1947 by passage of the Taft-Hartley Act?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Current Two-Member Board Is Not Permitted By Statute To Issue Decisions And Orders 3

II. The NLRB's Decision-Making Process ... 8

A. Two-Member Decision-Making Distorts The NLRB's Decisional Processes And Is Inconsistent With The Statute's Plain Language 8

B. The Two-Member Board Undermines the Ability of the Serving Members to Fulfill Their Statutory Obligations 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 7

Duncan v. Walker, 533 U.S. 167 (2001)..... 6

Elken Metals Co. v. United States, 126 F. Supp. 2d 567 (Ct. Int'l Trade 2000) 12

Federal Communications Commission, et al. v. ITT World Communications, Inc., 466 U.S. 463 (1984)..... 12

Laurel Baye Health Care of Lake Lanier, Inc. v. NLRB, 564 F.3d 69 (D.C. Cir. 2009), *pet. for cert. pending* (No. 09-377)..... 1, 7

Narricot Industries, L.P. v. National Labor Relations Board, 587 F.3d 654 (4th Cir. 2009) 7

Northeastern Land Services v. National Labor Relations Board, 560 F.3d 36 (1st Cir. 2009)..... 7, 18-19

Snell Island SNF LLC v. National Labor Relations Board, 568 F.3d 410 (2d Cir. 2009) 7

Teamsters Local Union No. 523 v. National Labor Relations Board, Case Nos. 08-9568,

08-9577, 2009 U.S. App. LEXIS 28181 (10th Cir. Dec. 22, 2009) 7

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 6

NLRB

Alcoa, Inc., 352 NLRB No. 141 (August 29, 2008) 19

AM Property Holding Corp., 352 NLRB No. 44 (March 27, 2008) 17-18

Atrium at Princeton, LLC, 353 NLRB No. 60 (December 5, 2008) 19

Essex Valley Visiting Nurses, 352 NLRB No. 61 (April 30, 2008) 19

Fluor Daniel, Inc., 353 NLRB No. 15 (September 25, 2008) 19

Hamilton Sundstrand, 352 NLRB No. 65 (May 19, 2008) 19

Kingsbridge Heights Rehab., 353 NLRB No. 69 (December 24, 2008) 19

Local One-L, Amalgamated Lithographers, 352 NLRB No. 114 (July 31, 2008) 19

Local 687, Michigan Regional Council of Carpenters (Convention & Show Services, Inc.) 352 NLRB No. 119 (July 31, 2008) 1

Magic Beans, LLC, 352 NLRB No. 107 (July 18, 2008) 19

Mashantucket Pequot Gaming Enterprise, 353 NLRB No. 32 (September 30, 2008) 19

McBurney Corp., 352 NLRB No. 112 (July 23, 2008) 19

Medco Health Solutions, 352 NLRB No. 78 (May 30, 2008) 19

Northeastern Land Services, 352 NLRB No. 89 (June 27, 2008) 18

The Lorge School, 352 NLRB No. 17 (February 19, 2008) 19

Statutes

5 U.S.C. § 552b 11, 13

29 U.S.C. § 153(b) ..... *passim*

Miscellaneous

James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J. 221 (2005) 14-15

McCulloch, Frank W., and Tim Bornstein, 1974, *The National Labor Relations Board*, New York: Praeger 10

Miller, Edward B., *An Administrative Appraisal of the NLRB*, University of Pennsylvania, Industrial Relations Research Unit, 1977 10

National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights: Hearing Before the Senate Subcomm. on Employment and Workplace Safety, and House Subcomm. on Health, Employment, Labor and Pensions, 110th Cong., 1st Sess. (December 13, 2007) 14

Ronald Taylor, *On the Authority of the Two-Member NLRB: Statutory Interpretation Approaches and Judicial Choices*, U. Houston Pub. L. & Legal Theory Series 2009-A-33 (2009) 7

S. Rep. No. 94-354 (1975) 12

Susan J. McGolrick, *NLRB Enters New Year With Three Vacancies, Two Members Issuing Decisions*, Daily Lab. Rep. (BNA) (January 30, 2008) 16

Susan J. McGolrick, *Schaumber, Liebman Discuss Dynamics Of Two-Member Board; 'Bush Board' Legacy*, Daily Lab. Rep. (BNA) (September 18, 2008) 17

William N. Cooke, et al, *The Determinants of NLRB Decision-making Revisited*, 48 Indus Labor Rel Rev 237 (1995) 9, 10, 15, 16

INTEREST OF THE *AMICUS CURIAE*[1]

The Michigan Regional Council of Carpenters ("MRCC") is a labor organization located in the Metropolitan Detroit area of Michigan. MRCC represents approximately 18,000 carpenters and millwrights. The MRCC is party to a case currently pending in the U.S. Court of Appeals for the District of Columbia Circuit[2]. Following the D.C. Circuit's Decision in *Laurel Baye Health Care of Lake Lanier, Inc. v. NLRB*, 564 F.3d 69 (D.C. Cir. 2009), *pet. for cert. pending* (No. 09-377). Pet. App. 82-98, MRCC moved for summary reversal. The case is currently being held in abeyance by the D.C. Circuit.

MRCC challenged the Board's power and authority to issue decisions with only two sitting members. The Board Order pending before the D.C. Circuit is reported at 352 NLRB No. 119 (July 31, 2008), *Local 687, Michigan Regional Council of Carpenters (Convention & Show Services, Inc.)*.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Consents are being filed simultaneously with this Brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae's* intention to file this brief.

[2] *Michigan Regional Council of Carpenters, Local 687 v. NLRB*, Nos. 1310 and 1324.

MRCC is interested in the present litigation because it seeks a full opportunity to bring to the Court's attention its position on the Board's delegation and quorum requirements. The resolution of the quorum question is likely to directly impact the disposition of MRCC's pending appeal. While the majority of cases issued by the two-member Board have involved employer respondents, the two-member Board also issued orders against a number of unions, including MRCC. The question of the Board's delegation and quorum requirements is an institutional and legal process issue, not a union or management issue

SUMMARY OF ARGUMENT

The Brief supports arguments made by New Process, L.P. and/or addresses both the plain meaning of the statutory language and the negative policy consequences resulting from two member decision-making.

The National Labor Relations Act does not authorize a two-member sub-group to issue decisions and orders. This fact is not in dispute. The NLRB, however, claims that a provision in the Act, which provides only that a group of three or more members has a quorum requirement of two members, authorizes a "two-member quorum" to exercise the powers of the NLRB. The NLRB's argument, however, fundamentally misapprehends the meaning of the quorum provision and relies on that language to the exclusion of the Act's requirement that the NLRB can only delegate its powers to groups of three or more members.

Additionally, the NLRB's longstanding decision-making process is distorted by the two-member Board. The language and legislative history, as implemented by the Board's actual decisional practices, demonstrate that the Act, as written by Congress, never intended that decisions be made by two members except in limited circumstances not present here. Moreover, decisions rendered by the two-member Board have resulted in repeated instances in which both members have taken positions contrary to their policy convictions and legal philosophy for the sake of institutional efficiency.

ARGUMENT

I. The Current Two-Member Board Is Not Permitted By Statute To Issue Decisions And Orders.

The statutory provisions implicated in this case, 29 U.S.C. §153(b), provide, in part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group

> designated pursuant to the first sentence hereof.

For ease of reference, Section 3(b) contains the following provisions:

- Board Quorum Requirement: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board."

- Delegation: "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."

- Sub-Group Quorum: "[E]xcept that two members shall constitute a quorum of any group pursuant to the [Delegation provision]."

- Vacancy: "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board."

As New Process has persuasively argued, the two-member Board consisting of Chairman Liebman and Member Schaumber, is not empowered by Section 3(b) to issue decisions and orders. The Board in December 2007, consisting at that time of four members, delegated its authority to a three-member group of Members Kirsanow, Liebman and Schaumber. The delegation was effective on December 28, 2007, three days before Member

Kirsanow's term expired. The Board delegated its power to a three-member group without any pretense that the three members would issue a single decision or order.

The Board has not argued in this case or any other that it is statutorily permitted, by operation of the Vacancy provision or otherwise, to delegate its powers to a two-member sub-group.

Yet, this is the critical question before the Court. If the Board is not authorized to delegate its powers to a two-member sub-group, then it is likewise not authorized to delegate its powers to a three-member group that it knows will become a permanent two-member sub-group within days of the delegation. Nonetheless, the NLRB attempts to leverage the Sub-Group Quorum provision of Section 3(b) to justify its disregard for the Delegation provision. Its argument, however, would render part of Section 3(b) meaningless.

The plain language of Section 3(b) establishes that the Board is permitted to place all its powers in a group of **three or more** members, pursuant to the Delegation provision. The Sub-Group Quorum language provides only that a group of **three or more** members has a quorum requirement of two members. The Sub-Group Quorum provision does not replace the Delegation provision. To assert as much does not acknowledge the plain language of the NLRB Board Quorum and Sub-Group Quorum provisions, yet this is in reality what the NLRB contends. The NLRB argues that its December 2007 procedural maneuver satisfies the Delegation

provision, solely because at the moment of delegation (and for another two days) a group of three members existed to receive the delegated powers. The NLRB's action satisfied the Delegation provision only for a brief period of time, however. Once the three-member group ceased to exist (upon the departure of Member Kirsanow), the group ceased possessing the powers delegated to it by the Section 3(b) Delegation provision. The Sub-Group Quorum provision does not imbue a permanent two-member sub-group with the powers that, under the Delegation provision, only a group of **three or more** members can exercise.

The NLRB's construction of Section 3(b) relies on the Sub-Group Quorum provision to the exclusion of all other language and consequently renders the Delegation provision meaningless. Doing so violates the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (*quoting Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)). Why would Congress limit the NLRB's authority to delegate powers to groups of **three or more** members in the Delegation provision, if it intended to allow a delegation to two members via an expansive interpretation of the Sub-Group Quorum provision? The answer, of course, is that Congress did not intend the Sub-Group Quorum provision to nullify the three-member minimum requirement of the Delegation provision.

Stripped down to its essence, the NLRB's contention is that because the Sub-Group Quorum provision permits two members of a three-member group to issue decisions and orders, Chairman Liebman and Member Schaumber were authorized to issue decisions. The glaring deficiency in this argument, of course, is that Chairman Liebman and Member Schaumber were not part of a three-member group. They were, at all times in 2008, a two-member sub-group. A comprehensive construction of the plain language of the Act does not permit the Delegation provision of Section 3(b) to be used to concentrate the Board's powers in only two-members.[3]

---

[3] As Petitioner has persuasively argued, the Seventh Circuit's decision rests on a flawed interpretation of Section 3(b) similar to the misconstruction of that text by the First Circuit in *Northeastern Land Services v. National Labor Relations Board*, 560 F.3d 36 (1st Cir. 2009). The Fourth Circuit likewise misinterpreted the plain language of Section 3(b) in *Narricot Industries, L.P. v. National Labor Relations Board*, 587 F.3d 654 (4th Cir. 2009). To the contrary, the D.C. Circuit's decision in *Laurel Baye, supra*, correctly applied the quorum requirements of Section 3(b). The Second Circuit, and very recently the Tenth Circuit, also reached an incorrect result by invoking deference to the NLRB under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Snell Island SNF LLC v. National Labor Relations Board*, 568 F.3d 410 (2d Cir. 2009) and *Teamsters Local Union No. 523 v. National Labor Relations Board*, Case Nos. 08-9568, 08-9577, 2009 U.S. App. LEXIS 28181 (10th Cir. Dec. 22, 2009). The two-step inquiry under *Chevron* is not applicable in these circumstances where there has never been any "interpretation" by the NLRB of Section 3(b)'s quorum requirements, and where the issue concerns the agency's power to act instead of the substantive provisions of the statute it administers. *See also*, Ronald Taylor, *On the Authority of the Two-Member NLRB: Statutory Interpretation Approaches and Judicial Choices*, U. Houston Pub. L. & Legal Theory Series 2009-A-33 (2009).

II. The NLRB's Decision-Making Process.

A. Two-Member Decision-Making Distorts The NLRB's Decisional Processes And Is Inconsistent With The Statute's Plain Language.

The failure of the two-person Board Decisions to comply with the statutory requirement that three members compose the minimum quorum of the five member Board is exacerbated because two-person Board Decisions have been released while the Board purportedly continues to follow policies which distort the decision-making process of the two-person Board in other ways.

For a substantial period of time, and at least for the 20 years subsequent to the beginning of Counsel of Record for MRCC's service as a Board Member in 1988, serving Members have adhered to a policy by which the Members have agreed not to change major or significant precedent without the presence of a full five member Board.

The problem with this convention in the two-person context is facially apparent because the scope of "major" or "significant" is clearly subject to interpretation. When this informal commitment to the non-reversal of significant precedent is coupled with Board procedures which allow a single Board member to require that any case be heard by the full Board, along with the concomitant ability of any member to hold a case in the decision process until

there is a full five-person Board, it is apparent that the attempted delegation is inconsistent with the intent of Congress in enacting the Taft-Hartley Act, which expanded the Board membership from three to five. In addition, when more than three members are serving, members of the Board who are not part of the initial panel of three, have the right to opt onto the case or to designate the case as one that should be decided by a full Board. Implemented Board processes and policies are improperly altered and distorted when only two persons purport to decide cases.

A 1995 Article in the Cornell *Industrial Labor Relations Review* accurately describes the Board's procedures for reaching a decision and highlights the complexity of this process. *See* William N. Cooke, et al, *The Determinants of NLRB Decision-making Revisited*, 48 Indus Labor Rel Rev 237, 239-240 (1995). Professor Cooke explains that appealed cases are initially assigned on a rotating basis to three-member panels of the Board, at which point one panel member is designated as the "originating board member." Each member relies heavily on his or her staff to evaluate Administrative Law Judges' recommendations and exceptions filed and to draw up recommendations.

Except on rare occasions, no hearings are held by the Board. Prior to making recommendations to members, the staff representatives assigned to a case by each member of a given panel usually meet to discuss the recommendations that each intends to make to the panel members he or she serves. These meetings are not intended for the purpose of

reaching consensus among the assigned staff. The discussion of any opposing views, nevertheless, may influence the recommendations made by staff representatives to the members they serve. Some cases are simple enough that even before the panel members' staff meet to discuss cases, staff representatives of the originating Board member prepare drafts of recommended decisions for circulation to other Board members. All five Board members receive a copy of the panel's proposed decision and proposed dissents, if any, for every case. There is no formalized step or practice in which members discuss cases with one another before rendering individual decisions; however, some Boards have engaged in informal discussions prior to making decisions. *Id. citing* McCulloch, Frank W., and Tim Bornstein, 1974, *The National Labor Relations Board*, New York: Praeger, pp. 90-91; Miller, Edward B., *An Administrative Appraisal of the NLRB*, University of Pennsylvania, Industrial Relations Research Unit, 1977, pp. 76-77.

Cooke further explains that when disputes appear to be especially important or complex ones, all five members normally vote. It is Board policy that any member may request that all members vote if a case is novel, if the nature of the dispute requires a new interpretation of the law, or if members of the Board seek to redefine policy or set new policy.[4] In

---

[4] If a member requesting review by the full Board is part of the three-member panel assigned to the case, this request may be made at any time. If the request for a full Board decision is made by a member who is not part of the panel assigned to the case, the request is made when the full Board reviews the panel's proposed decision and any dissenting opinions. *Id.*

cases involving the full Board, staff representatives of each member meet to discuss the case and jointly prepare a memorandum, which, without making recommendations, discusses the applicable facts and law and the implications of alternative resolutions. *Id.*

The current Board has utilized super panels to a greater extent than earlier Boards, but a review of the various voting steps underscores the importance of the checks and balances incorporated in the textual language that Congress used in creating the five-member Board, which also required that a quorum of the five members be three or more. The language and legislative history, as implemented by the Board's actual decisional practices, clearly demonstrate that the statute, as written by Congress, never intended that decisions be made by only two members.[5]

The Board routinely takes actions by notational voting which is permitted for multi-member governmental agencies pursuant to the Government in the Sunshine Act. 5 U.S.C. § 552b. Notational voting is a procedure employed by multi-member governmental agencies which conform to the open meeting requirements of the Sunshine Act. Notational voting allows NLRB members to act on agency matters individually, instead of deliberating and voting as a group during an open agency session.

---

[5] In instances where the Member's term expired or if there was a death subsequent to the case being decided, the three person minimum requirement is complied with because, when the decision was rendered, a legal quorum existed.

See, Elken Metals Co. v. United States, 126 F. Supp. 2d 567 (Ct. Int'l Trade 2000). With its three member case panels, the Board regularly uses notational voting to decide cases. Similarly, Congress recognized that not all business of an administrative agency can be conducted entirely in the public eye. As such, informal background sessions intended to clarify issues and promote debate are also not subject to scrutiny under the Sunshine Act. *See*, S. Rep. No. 94-354, p.19 (1975); *Federal Communications Commission, et al. v. ITT World Communications, Inc.*, 466 U.S. 463, 469-470 (1984). Beginning at least as early as 1988, the Board has concluded that a meeting of three members to discuss pending adjudications would require compliance with the open meeting provisions of the Sunshine Act.[6]

The NLRB's historical interpretation of and adoption of procedures to follow the Sunshine Act indicate that the Board itself believes that a quorum of three members triggered application of the Sunshine Act. Because the NLRB has treated meetings of three-member groups as being subject to

---

[6] Counsel of Record for MRCC, Dennis M. Devaney, served as a Member of the Board from 1988 to 1994. He is personally familiar with the Board's procedures pursuant to the Government in Sunshine Act dating from his service as a Board Member. For approximately two months in 1993-1994, the Board was also composed of only two members, Mr. Devaney and then-Chairman James M. Stephens. In consultation with the Solicitor of the NLRB, the two sitting members concluded that the statute required a quorum of three members to decide cases. Thus, no decisions were rendered until President Clinton's appointees were confirmed by the United States Senate.

the Sunshine Act, while two-member sub-groups have not been deemed to be subject to the Sunshine Act, the Board has, in practice, acknowledged that the Board Quorum requirement of three members at all times is consistent with the Sunshine Act's application to meetings when three members participate. The current two member Board would not be subject to the scrutiny of the Sunshine Act, even when conducting public meetings. Such a result would be inconsistent with the public policy underlying the Sunshine Act.

In the MRCC case in which we are counsel for the Petitioner, the lack of an appropriate three member panel has had significant consequences. The office of the General Counsel, after initially not objecting to certain MRCC internal disciplinary procedures, reversed its position which is lawful in light of the General Counsel's unreviewable discretion to prosecute or not prosecute unfair labor practices. However, MRCC's challenge to this change in policy was not addressed by a quorum of the Board that consisted of three members.

B. The Two-Member Board Undermines the Ability of the Serving Members to Fulfill Their Statutory Obligations.

The imbalance of the two-member Board has resulted in repeated instances in which both members have sacrificed their obligations to intrepret the law for institutional efficiency.

The NLRB is a quasi-judicial body that is largely free from the constraints of stare decisis. A member's obligation is to intepret the Act as he or she believes it applies to facts presented in a particular case.[7] As a consequence, Board law changes from time to time. It is common that regulatory agencies seek to be both faithful to the regulatory policies enacted by prior Congresses and responsive to the legal, economic and political changes that have altered the nature of their

---

[7] [I]f a Member honestly believes that a prior precedent no longer makes sense, and that a change would be more in keeping with the fundamental principles described above, he/she can – and may feel obligated to – vote to change the law . . . prudently exercised, change is proper and, indeed, was envisaged by Congress. *See The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights: Hearing Before the Senate Subcomm. on Employment and Workplace Safety, and House Subcomm. on Health, Employment, Labor and Pensions*, 110th Cong., 1st Sess. (December 13, 2007) (testimony by Robert J. Battista, Chairman, NLRB).

regulated marketplaces. As a result, agencies may well engage in a process of updating statutory meaning as part of their policymaking role and construe statutory text dynamically. James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J. 221, 224 (2005).[8]

It is generally understood that NLRB decision-making is influenced by the particular philosophy and background of the individual Board members. That is to say, Board members bring a political and policy framework to deciding ULP cases before them. William N. Cooke, et al, *The Determinants of NLRB Decision-making Revisited*, *supra* at 255-256 (1995). As the Board's make-up changes with administrations, it can be expected to reverse its previous interpretation of the law, especially in its decisions on cases that are important or precedent-setting. It has been argued that, through the election of new Presidents, the public expresses desired changes in the direction taken by regulatory agencies, including the NLRB. Because the Act leaves wide latitude for intrepeting what is an unfair labor practice, the shift in public sentiment represents legitimate guidance to Board members. Therefore, a Board member's reflection in his or her decision-making of the President's

---

[8] Brudney argues that the NLRB's autonomy in this respect "has lately been associated not with making the NLRA effective or adaptable to changed circumstances but rather with the Act's diminished relevance or applicability to the modern American workplace." *Id.*

preferences serves the useful purpose of making the Board responsive to public sentiment. *Id.*

In this context, a member of the Board has an obligation to decide cases based on his or her view of the law, not to avoid stalemates or "institutional" problems. The doctrine of stare decisis does not restrict a Board member from deciding cases based on what the law ought to be as opposed to whether a wrongly decided issue is settled. If, for example, a Board member views a decision as wrongly decided, at a minimum the member may issue a dissenting opinion. Member (now Chairman) Liebman has issued countless dissents in recent years. Because the NLRB has no direct enforcement powers, decisions and orders of the Board are ultimately subject to approval, modification or rejection by the courts. As a result, dissenting opinions are expressed forcefully to persuade the courts to consider that viewpoint seriously. Cooke, *supra*.

The two-member Board has, by necessity, modified its practices in light of its decision to issue decisions without a three-member group. Liebman stated that the two-member Board's "primary objective is to try to operate as close to normal operations as possible."[9] She stated further that she would "acquiesce in the fact that there is new law which was just created that I don't like and there's old law, or new law, that Member Schaumber doesn't

---

[9] Susan J. McGolrick, *NLRB Enters New Year With Three Vacancies, Two Members Issuing Decisions*, Daily Lab. Rep. (BNA) at S-9 (January 30, 2008).

like and might otherwise have changed but acknowledges is the law." *Id.*

Schaumber admits that the two-member Board can be viewed as "stymied and dysfunctional."[10] He acknowledged that the current Board is unable to reverse precedent because the Board traditionally does not do so unless at least a three-member majority agrees. He stated further that "this aspect of the board's paralysis deprives us of the ability to fulfill our statutory role, it undermines government in general in my view and the board in particular in the eyes of those who we are charged with protecting and regulating." *Id.*

The two-member Board has openly departed from long-standing Board decision-making norms for the sake of institutional convenience. In over a dozen cases in 2008, for example, Schaumber or Liebman set aside their policy positions for "institutional reasons." This has resulted in parties being denied an effective remedy or defense because of the Board's desire to avoid a tie-vote stalemate.

In *AM Property Holding Corp.*, 352 NLRB No. 44 (March 27, 2008), the two-member Board reconsidered the dismissal of an unlawful-recognition allegation by a prior three-member panel of Chairman Battista and Members Liebman and Kirsanow. The two-member Board granted the motion for reconsideration and found that the employer had

---

[10] Susan J. McGolrick, *Schaumber, Liebman Discuss Dynamics Of Two-Member Board; 'Bush Board' Legacy*, Daily Lab. Rep. (BNA) at C-1 (September 18, 2008).

violated the Act. The union sought special remedies against the employer, who had violated the Act four times in similar circumstances. In the underlying case, Member Liebman dissented in part, stating that she would grant the special remedies. However, she denied the request in this case: "In her view, the additional violation found here would further support granting those remedies. However, for institutional reasons, she concurs with Chairman Schaumber in denying the motion." *Id.*, fn. 9.

In *Northeastern Land Services*, 352 NLRB No. 89 (June 27, 2008), the two-member Board found that the employer violated the Act by maintaining an overbroad employee confidentiality policy. The Board further found that an employee who was disciplined pursuant to the policy was "necessarily unlawful." Chairman Schaumber disagreed with the doctrine supporting the Section 8(a)(3) violation, but nevertheless found a violation. He noted that he

> questions the theory that an employer's imposition of discipline pursuant to an unlawfully overbroad rule is necessarily unlawful, such as in situations where the discipline imposed is for a lawful reason albeit under an overly broad, unlawful rule. Nonetheless, he applies precedent for institutional reasons for the purpose of deciding this case.

Id., fn. 9. The employer in this case appealed to the First Circuit Court of Appeals, challenging the authority of the two-member delegation. The First Circuit, however, rejected the challenge.

Northeastern Land Services v. National Labor Relations Board, 560 F.3d 36 (1st Cir. 2009).

In the following cases, either Schaumber or Liebman disregarded his or her view of what the Act requires for "institutional reasons" of issuing a two-person decision: *Essex Valley Visiting Nurses*, 352 NLRB No. 61 (April 30, 2008); *The Lorge School*, 352 NLRB No. 17 (February 19, 2008); *Medco Health Solutions*, 352 NLRB No. 78 (May 30, 2008); *Magic Beans, LLC*, 352 NLRB No. 107 (July 18, 2008); *Local One-L, Amalgamated Lithographers*, 352 NLRB No. 114 (July 31, 2008); *Alcoa, Inc.*, 352 NLRB No. 141 (August 29, 2008); *Mashantucket Pequot Gaming Enterprise*, 353 NLRB No. 32 (September 30, 2008); *Atrium at Princeton, LLC*, 353 NLRB No. 60 (December 5, 2008); *Hamilton Sundstrand*, 352 NLRB No. 65 (May 19, 2008); *McBurney Corp.*, 352 NLRB No. 112 (July 23, 2008); *Fluor Daniel, Inc.*, 353 NLRB No. 15 (September 25, 2008); *Kingsbridge Heights Rehab.*, 353 NLRB No. 69 (December 24, 2008).

Had these cases been held in abeyance until the Board had a properly-constituted and statutorily-authorized quorum of three or more members, the views of each member of that group might have coalesced into a decision reaching a different result. Perhaps a ruling would have issued that departs from what is considered extant Board law. In all of these cases, the parties were deprived of that process. In case after case, Liebman and Schaumber were forced by circumstance to put aside their policy positions for "institutional reasons."

It is clear that two-person decision making compromises the stated views of what Board law requires in order to move cases out the door. Many parties who came before the two-member Board witnessed their dispute resolved not by principle, but rather by institutional expediency. The reason for this outcome was the perhaps well-intentioned, but fatally-flawed, decision by the Board to attempt to delegate its powers to a two-person group which concedes that avoiding stalemate and not informed analysis is the paramount consideration. The primary adjucatory function of the Board, thus, gave way in many instances to the expediency of avoiding "delay." This result is anathema to the fundamental mission of the Board.

CONCLUSION

For the reasons set forth above, *Amicus Curiae*, Michigan Regional Council of Carpenters, Local 687, respectfully requests that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

Dennis M. Devaney
Counsel of Record
Jeffrey D. Wilson
George S. Fish
Strobl & Sharp, P.C.
300 E. Long Lake Road,
Suite 200
Bloomfield Hills, MI 48304
(248) 540-2300